THE

LAW QUARTERLY REVIEW.

No. XXXIV. April, 1893.

NOTES.

[WE owe the following note to the kindness of a correspondent who has held high office in British India. The story seems to throw some reflected light on the solid motives our own medieval ancestors may have had for their exaggerated horror, as it seems to modern notions, of maintenance and champerty.]

The subjoined extract, from a report by a British officer, regarding the existence of predial slavery among the tribes on the northern frontier of Burmah, may afford some new illustrations of the character of primitive law. It will be observed that among wild folk, even more than in the best civilized society, any complaint of injury becomes at once a question of damages. The extreme severity of the law against debtors will also be noticed, as characteristic of early institutions; and it will be remarked as something of a novelty in judicial practice, that the presiding judge in a civil suit has the privilege of buying up the injured party's right to compensation. Claims for debt or personal damages being freely transferable, they are naturally bought up by those who have the power to enforce them; and here the judge occupies a point of vantage. The system may be deleterious to judicial impartiality, nevertheless there is something to be said for it in a state of society where a weak and poor complainant, who could neither maintain his suit or pay the judge's fees, would have no chance of redress against a defendant of strength or influence. In the particular case quoted, however, where one man sued the other for dirking him, the claim seems to have been purchased and the defendant enslaved so summarily that one cannot altogether exculpate the judge from having acted with lamentable precipitation.

(EXTRACT.)

It must be remembered that the word 'debt,' which is so commonly used among the Kachins[1], is a term of much wider

[1] The Kachins and Shans are two tribes on the north-eastern frontier of Burmah; and the Sawbwa is a village headman.

signification than is customary with us. It comprises not only the non-satisfaction of any claim acknowledged as correct by both parties, but also includes damages for real or imaginary grievances, and it is in this way that the chief difficulty in dealing with the matter is involved. The questions naturally arise, in the event of a difference of opinion between the two parties, Who is to assess the damages? And is the complainant to be allowed to take the law in his own hands by arresting the defendant, when the latter either denies the claim or asserts that it is for a less amount than the complainant is contending for? When it is further considered that in the Kachin Hills the proprietary right, if one may use the term, in a grievance or 'debt' is also transferable, the question becomes still more intricate. An illustration may perhaps bring this out more clearly. When the Irrawaddy column arrived at Sagong, I found a Shan Talôk slave there belonging to the Sawbwa. The facts of his case were as follows. He had a quarrel with a Kachin of Sagong village. Both men being drunk at the time, they drew their das, and the Shan Talôk wounded the Kachin. The latter reported the matter to his Sawbwa, who asked him if he was willing to dispose of his right of compensation. As the man agreed to this, the Sawbwa bought out his interest in the matter for a gong and a buffalo, and then made the Shan Talôk a slave, as the latter, being a poor man, was unable to satisfy the claim which the Sawbwa had acquired by purchase against him. Cases like the above show how the principle of compensation may be turned into an engine of oppression. The Shan Talôk had no trial; he probably wounded the Kachin in self-defence, as it is unlikely he would have had the hardihood to strike a Kachin belonging to the village which 'protected' his own village, and yet he was made a slave when a full investigation into the facts would have probably cleared him of the charge altogether. Again, it is conceivable that the enemy of a man might be only too glad to buy out the claim of another man who had a grievance against his enemy, and might possibly be willing to pay more than the customary price. If the other party, to secure his release, were willing to pay the compensation required (namely, the amount which had already changed hands on account of him), he would be thus mulcted in an additional sum. This system of 'debts' is universal throughout the Kachin tracts. It is a relic of the old days, when it was often the only method by which a rough and ready justice could be obtained. The *modus operandi* of collecting a debt is as follows: The aggrieved party goes to the village of the person against whom he has a claim and lays his case before the Sawbwa. If the latter disapproves of it, the matter is at an end unless the two villages are prepared to fight it out. If the Sawbwa agrees to the validity of the claim, the complainant then arrests the defendant and also carries off any cattle and valuables the latter may possess. In every case a fee must be paid to the Sawbwa of the village. This fee is known among the Shan-Burmans as *myebo* (literally the price of the land, *i.e.* the toll leviable by the Sawbwa for allowing the complainant to take action in his territory); generally speaking it is paid out of

the captured person's property in the village. If he has none, the complainant pays the Sawbwa a certain portion of the amount realized by the sale of the slave. This principle of course is vicious as it gives the Sawbwa a direct interest in the case put forward by the complainant.

Onward Building Society v. *Smithson*, '93, 1 Ch. 1, C. A., is a case of some curiosity. *Z* is *A*'s agent in the sale of considerable estates. *A*, in the due course of business, conveys Blackacre, Whiteacre, and Greenacre to *Z*, who mortgages the whole to *M*. About fifteen months later *Z* obtains another conveyance purporting to be of Greenacre from *A* by fraud, stating to *A*, who accepts his statement without examination, that Greenacre was not comprised in the former conveyance. As *A* has neither title nor seisin, this second conveyance, though not void as a deed, can have effect only by estoppel, and *Z* is debarred by his own fraud from taking advantage of any estoppel there may be, and also from suing on any covenant in the deed. *Z* then, under colour of his second conveyance, mortgages Greenacre to *N*. The legal estate is already in *M*, but *N* gets all that *Z* has left, namely, his equity of redemption under the mortgage of *M* for what it is worth. *Z* absconds, *M* takes possession, *N* finds nothing left for him.

Has *N* any right to indemnity from *A*? Not as for a tort, on the ground of the representation involved in *A*'s second conveyance that *A* still had Greenacre to convey: for, if negligent, it was not fraudulent. This is a necessary consequence of *Derry* v. *Peek*, though probably an unexpected one.

Then, as that conveyance passed nothing unless by estoppel, *N* must make out a clear estoppel before he can be heard to claim anything as *Z*'s assign.

Suppose he does make out an estoppel (which the Court of Appeal, in this case, held he could not), then can he take advantage of *A*'s covenants as running with the quasi-title by estoppel, although *Z*, the grantee, could not himself have sued on them? The Court left this question open, though Lindley L.J. inclined to think the assign could not be in a better plight than the grantee through whom he claimed. Whenever the question arises again, it may be necessary to attend more closely to the distinction between a conveyance by a party entitled or in possession, which, though voidable for fraud or otherwise, passes a real estate or interest subject to the vendor's or any other right to rescind, and an instrument executed, as in this case, by an apparent grantor who in truth has neither title nor possession. We submit that the covenants for title exist for the benefit, not of purchasers who get

a really good title and do not need them, nor of those who omit to secure a possession consistent with the apparent title, but of those who have got a plausible title, and *de facto* possession according to it, and are disappointed without their own fault.

A learned correspondent, who is dissatisfied with the above case, sends the following note:—

Part of the reasoning upon which the decision is founded is likely, we fancy, to surprise real property lawyers. A covenant against incumbrances runs with the land. This is agreed. But the Court of Appeal has put this gloss upon the doctrine, viz. that if the covenant was broken by the covenantor having in fact previously conveyed away his whole estate, so that no land passed or could pass by the conveyance containing the covenant, though the immediate covenantee could sue the covenantor on his covenant, yet if the covenantee in his turn conveys, his grantee cannot in that character sue the covenantor because no estate passed from the covenantor to the covenantee or from him to his grantee. We venture to think that if there had been the slightest idea that such was the law, conveyancers would have inserted, as they must now insert, in every conveyance a power of attorney to sue in the name of the conveying party on the covenants previously taken by him. A grantee who has taken the precaution of inserting such a power of attorney in his grant, would be able to sue on the covenants taken by the grantor, notwithstanding the new doctrine that such covenants do not run with the land. It is submitted that the very fact that it has not been the practice to insert such a power of attorney might reasonably have been taken into consideration. And it may be thought that a new doctrine of which the first effect will only be to add a few words of style to ordinary conveyance, savours of a perverse ingenuity.

It is difficult to see where the disturbance occasioned by the new doctrine will stop. An ordinary conveyance on a sale by mortgagor and mortgagee, where the mortgage was in fee simple, contains covenants for title by the mortgagor, which we must suppose become absolutely futile, if the purchaser mortgages again the following day. For we must remember that the doctrine is a doctrine of law, not of equity. The question is how the point would have been treated by a Common Law Court before the (con)Fusion, and the circumstance that some equity passes is altogether irrelevant.

There is indeed one authority rather in favour of the new doctrine. It is that of the Conveyancing Act, 1881, which incorporates the implied statutory covenants for title only when the party '*Conveys and* is expressed to convey' as beneficial owner. Is it possible that

they are not implied just in the one case where they are most wanted, viz. when the covenantor has in fact no estate to convey, by reason of his having fraudulently parted with his whole estate by some previous conveyance?

A learned correspondent writes:—*In re Hoyle*, '93, 1 Ch. (C. A.) 84, is one of those cases, of which there are many, which makes a thoughtful lawyer doubt whether the 4th as well as the 17th section of the Statute of Frauds [as to which see the next note] ought not to be repealed. It is certain that legal rules which are concerned with the ordinary conduct of life, ought to be simple and intelligible. An enactment with regard to ordinary contracts, which cannot be fairly interpreted without drawing the most subtle distinctions, is, in the eyes of anyone who tests law by the principle of utility, self-condemned. *In re Hoyle* is, few lawyers will doubt, rightly decided. It is possible to go further than this, and maintain that the Court of Appeal, consisting as it did of very eminent judges, was right as to every ground on which the Court determined that the guarantee, given by John T. Hoyle, was not a 'special promise to answer for the debt, default, or miscarriage, of another person' within the 4th section of the Statute of Frauds. All this may be conceded, but the awkward fact stares us in the face that the decision of the Court of Appeal, supporting the guarantee, depends on distinctions too fine to be appreciated by a judge of the Chancery Division, and which, it may be conjectured, would hardly be intelligible to laymen. No doubt it is one thing for *X* to say to *A*, 'if *N* does not pay you the £20 he owes you, or may owe you, I will pay it,' whilst it is another thing for *X* to say to *A*, 'if you trust *N*, and incur £20 loss by doing so, I will see you don't suffer.' But the two transactions are, in substance, very like one another, and *X*'s intention may in each case be expressed in nearly the same words. It is certainly odd that *X*'s promise is in the one case invalid, unless there be a note of it in writing, and in the other case valid, even though it be made by word of mouth, and evidenced by no written document whatever. [The Court did not really decide the point, for they held unanimously that, if there was a guaranty, there was a sufficient memorandum within the Statute.]

The ways of the *Law Reports*, or rather of their reporters, are, to say the least, mysterious. Why is *Taylor* v. *Smith*, which is properly reported in 61 L. J. Q. B. (C. A.) 331, not to be found in the *Law Reports* for 1892? The case is one of considerable importance. It deals with the very delicate question, What is meant by acceptance

within the 17th section of the Statute of Frauds? It throws at least some doubt upon the soundness of the judgment in *Page* v. *Morgan*, 15 Q. B. Div. 228, or at any rate proves that in the opinion of the Court of Appeal that judgement has not all the effect generally attributed to it. *Taylor* v. *Smith* in short is the last of a long line of cases, of which *Morton* v. *Tibbett*, 15 Q. B. 428, may be called the leading one, which, as long as the Statute of Frauds, sect. 17, remains in the Statute book, will require study. Why the case should not appear in the *Law Reports* we find it impossible to conjecture. One general reflection is certainly suggested by *Taylor* v. *Smith*; it is one we have made before, and shall doubtless be called upon to make again—Is it desirable that the mercantile transactions of everyday life should be regulated or impeded by distinctions so subtle as those which are necessary for justifying the opposite results of *Taylor* v. *Smith* and *Page* v. *Morgan*? Is not the time come for repealing the 17th section of the Statute of Frauds?

A contracting party's implied obligation to perform his contract within a reasonable time, where no time is expressly mentioned, is measured not by the average time of performing similar contracts in ordinary circumstances, but by what reasonable exertion on his part can effect in the actual circumstances. He is not answerable for delay caused by an event, such as a strike of dock labourers, altogether beyond his control, and whose consequences he cannot prevent or remedy by any reasonable precaution or exertion. So the House of Lords has decided in *Hick* v. *Raymond*, '93, A. C. 22, and expressly on grounds of general principle.

The decision of the C. A. in *Carlill* v. *Carbolic Smoke Ball Co.*, '93, 1 Q. B. 256, justifies our editorial notes on the case in the court below, L. Q. R. viii. 268–270, where we could not accede to the doubts expressed by a very learned contributor. The Lords Justices inclined to take different views on the point whether the words 'after having used the ball,' &c. in the advertisement meant 'within a reasonable time after' or 'after having used [and while still using] the ball.' Either reading sufficed for the plaintiff's claim upon the facts. The remarks of the Lords Justices on performance of the conditions of an offer being equivalent to, and dispensing with, acceptance in terms, when such is the intention, are of general interest and importance to students of the law of contract. We are unable to agree with one phrase at the end of Lord Justice A. L. Smith's judgement, that 'the more important consideration is the money gain likely to accrue to the defendants by the enhanced

sale of the smoke balls.' Detriment to the promisee is the true test. Besides, is not the supposed lucrative consideration too remote and contingent to be said to move from the promisee?

An infant is the spoilt child of English law. *Corn* v. *Matthews*, '93, 1 Q. B. (C. A.) 310, shows the care with which the law will protect him against the effect of any bargain not really for his interest. It reaffirms the principle that he is not bound by an indenture of apprenticeship which contains provisions substantially injurious to the infant, as for example that if his master's business is impeded by a turn out, the master should not, while the impediment lasts, be liable to pay him wages. The judgment of the Court in *Corn* v. *Matthews*, as A. L. Smith L.J. points out, is in conformity with the line of cases extending over a period of more than forty years. It is a different question however whether the principle which these cases establish is a reasonable one. A jurist, who approached the subject for the first time unhampered by precedents, might hold that the wise and expedient rule was to treat provisions in an indenture of apprenticeship which are unjust to an infant as void, but to hold the infant to be otherwise bound by the deed.

Our law has no objection to an infant executor, in fact it recognizes him while still *en ventre sa mere*, but it wisely provides (38 Geo. III. c. 87, s. 6) that an infant executor if sole executor is not to act till of age. Given however an infant who is not sole executor and who has a legacy left him for acting and does act, it is difficult to see why he should be deprived as he was in *Re Gardner* (41 W. R. 203) of the interest on his legacy 'durante minore aetate.' North J. seems to have thought that he could not elect to act till of age: but why? His co-executors supply his want of discretion. It is plain from *Rutland* v. *R.* Cro. Eliz. 378 that several executors may sue by attorney though one is an infant. In fact, in such a case the infant executor must sue (*Smith* v. *S.* Yelv. 130).

Executors must be thankful that in *Attorney-General* v. *Smith*, '93, 1 Q. B. (C. A.) 239, the Court of Appeal has affirmed the decision of the Divisional Court. That, even as things stand, any man should consent to become an executor may, according to the observer's taste, be regarded as evidence either of the folly or of the good nature of mankind. It would be hardly possible to induce any man of sense to accept an executorship if the Courts had decided that an executor, after completing the duties of an

administration, and winding up the whole estate, is liable to the Inland Revenue for the perfectly honest mistake made in the valuation of the testator's goods.

The purchaser of real property pays a deposit to the agent of the vendor. The sale goes off and the purchaser sues, not the vendor, but the agent, for the amount of the deposit. The purchaser cannot recover the deposit from the agent. This is the effect of *Ellis* v. *Goulton*, '93, 1 Q. B. (C. A.) 350. The only noteworthy matter is that the point should require decision. 'As soon as it is admitted that Jackson [the agent] received the money as agent for the vendor, and not as stakeholder, the matter,' says A. L. Smith L.J., 'is determined.' This remark is just, but English lawyers find it often difficult to follow out the elementary principles of the law of agency to their legitimate results. The ground of the difficulty is, it may be suspected, the want of that theoretical teaching of law which, in nearly every country but England, students receive from professors.

Craignish v. *Hewitt*, '92, 3 Ch. (C.A.) 180, all but raises several most interesting points on the law of domicil. It decides, however, one point only of any speculative interest, namely, that a man 'may be domiciled in a country without having a fixed habitation in some particular spot in that country.' On principle the decision is clearly sound, but language is constantly used both by judges and text writers, which suggests that a man cannot be domiciled, e.g. in England, unless there is some house or place in England where he resides with the intention of making it his permanent residence. This suggestion, though erroneous, does not often lead in practice to any bad result, but it confuses the whole theory of domicil.

Ryan v. *Mutual Tontine Chambers Association* ('93, 1 Ch. (C. A.) 116) is a good illustration of the inconveniences which would flow from extending the specific performance of contracts. The Chancery Division has plenty of work to do with looking after troublesome wards and defaulting trustees, without personally superintending hall porters and charwomen in the performance of their duties. As Lindley L.J. lately said in a debenture holder's action, the Court does not undertake to manage businesses. It is provoking, no doubt, when you have stipulated for a hall porter to be put off with a 'buttons' or worse, but damages are quite adequate to the occasion, because the prospect of a series of actions is certain to bring about the desired result. The case is not a brilliant example of

our judicial arrangements. A point of pure equity on the granting of an injunction is determined in the first instance by a judge of the Queen's Bench Division sitting for a Chancery colleague, and on appeal by a Court of which only one member has been trained in equity practice. A decision which involves dissent from a judgment of Lord Eldon's (see at p. 124) should be otherwise ordered even when it is right.

There is a well-known legal legend (see the following note) of a highwayman coming into equity for an account against his partner. *Scott* v. *Brown* (67 L. T. R. 782) seems a modern version of this—a company promoter coming into Court to enforce against his confederate a contract for purchase of shares at a fictitious premium. The contract was not a sham but it was part of a scheme, much favoured by company promoters who are floating a company, for deluding the public into thinking there is a bona fide market for the shares, and as the plaintiff had to disclose the 'turpis causa' the Court of Appeal drave him from the judgement-seat. 'I am quite aware it is very common,' said Lindley L.J. with epigrammatic severity: 'so is pocket-picking.' Such a conspiracy to raise the price of shares is in fact an indictable offence, but oddly enough it is not in itself civilly actionable (*Salaman* v. *Warner*, 64 L. T. R. 598).

A learned correspondent sends us the following note as to the story of a bill for an account brought by a highwayman, which was referred to by Jessel M.R., *Sykes* v. *Beadon*, 11 Ch. D. 170, at p. 195:—

Sir F. Pollock says in his book on Contracts, 5th ed. p. 263, note, 'Lord Kenyon once said by way of illustration, it appears, that he would not sit to take an account between two robbers on Hounslow Heath. May not the legend have arisen from this?' The 'legend' was current in Europ. Mag. for 1787, at p. 360. Lord Kenyon's remarks in *Ridler* v. *Moore*, reported Clifford, Southwark Election Cases, 371, were made in August 1797. He is reported to have said, 'He had heard of a bill filed in the Court of Chancery, to obtain an account of the profits of a partnership trade carried on at Hounslow, but when it appeared that the trade was taking the purses of those who travelled over the heath, the Court would not endure the bill.' This is testimony *to* the bill and not infirmative of it.

[Clearly the suggestion that Lord Kenyon's dictum may have started the story is disproved by the dates; but the dictum does not make it clear that Lord Kenyon believed the story himself. We

still decline to believe it, and can only suppose it took rise from some otherwise forgotten jest or hoax in an equity draftsman's chambers.—Ed.]

The best and most rational portion of English law is in the main judge-made law. Our judges have always shown, and still show, a really marvellous capacity for developing the principles of the unwritten law, and applying them to the solution of questions raised by novel circumstances. Unfortunately they have, for reasons which it is not perhaps very easy to define, been far less successful in their interpretation of the written law or, in other words, of statutes. The moment that a principle is enunciated in the form of a parliamentary enactment it is apt to become in the minds of English judges not the statement of a principle but a verbal rule, the meaning whereof is to be determined by rather narrow canons of interpretation. We do not for a moment maintain that *In re Watson*, '93, 1 Q. B. (C. A.) 21, is wrongly decided. We are well inclined to believe that according to the manner in which Acts of Parliament are interpreted, the decision is right; but it is difficult to avoid the conclusion that the object of the Judgments Extension Act, 1868, has, if the judgement of the Court of Appeal be right, not been attained; for the aim of that statute presumably was to place an Irish judgement registered in England in the same position as an English judgement, whilst *In re Watson* makes it perfectly clear that a registered Irish judgement has not in England all the effects of an English judgement. Whether the defects of parliamentary draftsmanship or the existing system of judicial interpretation be responsible for this result is for our present purpose immaterial. What *In re Watson* proves, not for the first time, is that parliamentary legislation, modified by judicial legislation, is apt to produce an unsatisfactory kind of law.

Jay v. *Johnstone*, '93, 1 Q. B. 25, decides what no one who has studied the cases on the subject could doubt, that the period of limitation on judgements is twelve years. The result, however, is reached in a way which is characteristic of English legislation. The draftsman who drew, and the Parliament which passed, the Real Property Limitation Act, 1874, had, we may conjecture, no idea whatever of changing the period within which an action on an ordinary judgment could be brought. They probably did not realize that it depended solely on the Real Property Limitation Act, 1833, and, it may be suspected, had in their minds no other aim than to limit the period for the recovery of land, or of money charged on land, to twelve years. But the result has been to

reduce the period of limitation for any action on a judgement from twenty to twelve years. Is it not time that this piecemeal legislation with regard to the limitations of time within which actions may be brought, should come to an end? It is a subject which ought to be made clear, and could easily be made clear, to laymen. A parliamentary draftsman who is well versed in the Statutes of Limitation could easily draw up a short Act exhibiting the periods of limitation in a tabular form. Such an Act, which would enable anyone at a glance to know within what time each kind of action could be brought, would be a benefit both to lawyers and to the public.

No decision delivered in the Chancery Division has for a long time excited so much popular interest as the judgement of Stirling J. in the *Missing Word Case*, *Barclay* v. *Pearson*, 9 Times L. R. 269. It was indirectly a judgement pronouncing illegal the attempt to re-establish lotteries, and, it may be suspected, caused disappointment to the thousands of respectable persons who would be shocked at being called gamblers, but enjoy nothing so much as real gambling, veiled under a form of a more or less intellectual amusement. With the main result of Justice Stirling's judgement no lawyer can quarrel. That Mr. Pearson had in reality set up a lottery, and that lotteries are illegal, are facts equally past a doubt, and common sense repudiates the idea that the Chancery Division should be occupied for days in redistributing the stakes which foolish persons had subscribed to Mr. Pearson's lottery. What, from a legal point of view, is less satisfactory is the intimation of Justice Stirling's opinion that each unsuccessful competitor can maintain an action at law for his subscription. The opinion may doubtless be correct. But it is opposed at any rate to the spirit of *Kearley* v. *Thompson*, 24 Q. B. Div. 742. The general principle undoubtedly is, and ought to be, that no person can bring an action which is based upon an unlawful contract. Can the subscribers to a lottery bring themselves within any of the exceptions to this principle? It is at least doubtful whether they can, and in such a case a judge ought rather to limit than extend the exceptions to a very salutary rule of law and morals.

N is employed by a firm of jewellers to sell goods on commission. They are left on his hands for the convenience of the firm. He pledges them to *X* a pawnbroker for an advance. *X* receives the goods bona fide and in the ordinary course of his business. The jewellers bring an action against *X* for the recovery of the goods. *X* is not protected by the Factors' Act, 1889 (52 & 53 Vict. c. 45),

s. 2. This is the effect of *Hastings* v. *Pearson*, '93, 1 Q. B. 62. As a decision on the words of the enactment the judgement of Justice Mathew in this case is apparently not open to criticism, but a question suggests itself whether it would not have been better if the Act had laid down the broad principle that an agent entrusted with goods for sale has authority, as regards third persons, who take the goods bona fide to give a valid pledge. If *A* gives *N* such possession of goods that *X* bona fide believes *N* to be owner thereof, it would seem to be fair that *X* should as against *A* be able to treat *N* as owner.

Knight v. *Lee*, '93, 1 Q. B. 41, and *Tatam* v. *Reeve*, '93, 1 Q. B. 44, are both satisfactory. They show, when taken together, that the judges are prepared, whilst construing the Gaming Act, 1892, strictly, to give to it its full and natural effect. If the Courts had, in interpreting the Gaming Act, 1845, given effect to the intention of the legislature, there would have been no need for the passing of the Gaming Act, 1892, and the Courts would have been freed from the inappropriate task of enforcing contracts which, if not wagers, are certainly connected with wagering.

Bonaparte v. *Bonaparte*, '92, P. 402, affords a good example of the rigour with which English courts refuse all effect to a judgement tainted by fraud. *A* and *B* obtain a divorce in Scotland from the Court of Session by a scheme of impudent collusion between husband and wife, and *C*, the co-respondent, and by an obviously fraudulent pretence that *A*, the husband, had acquired a Scotch domicil. On the strength of this divorce *B* the wife, and *C* the co-respondent inter-marry in the Isle of Man. The Probate Division, on the petition of *C*, pronounces the Manx marriage invalid. The invalidity of course arises from the Scotch divorce being so tainted by fraud as to be itself a nullity.

It seems from the dicta of the Lords Justices in *Lamb* v. *Evans*, '93, 1 Ch. 218, that there may be copyright in a sheet or page of advertisements as a whole, 'in respect of the collocation and concatenation' (Bowen L.J. at p. 228), distinct from the copyright belonging to the author or proprietor of each several advertisement. If the point were so decided, it might be an extension of the authorities we already have as to copyright in works of compilation as distinct from original composition, but it would hardly be a large one. See especially *Grace* v. *Newman*, L. R. 19 Eq. 623, as to compilation of designs for advertising purposes. But (a learned friend has suggested to us) is not the proprietor of a directory

himself only a person employed to collect the advertisements, namely by the individual advertisers? How then should he have any copyright for his own benefit? The answer is that each advertiser pays for, and obtains, whatever benefit he may get from his own advertisement being exhibited in a convenient order of reference, or otherwise in an arrangement well fitted to attract notice. But no one advertiser can, by the nature of the case, acquire any exclusive right to the combination of the advertisements as a whole. That right accordingly can belong only to the proprietor of the collected whole for what it may be worth.

The unjust steward in the parable was commended for having done wisely. In his case the credit of the idea of selling his master's goods below price belonged entirely to himself. In *Reg.* v. *De Kromme* (17 Cox C. C. 492) it originated with the debtor who offered the manager of a linoleum company's business various sums in the nature of bribes to let him have the company's goods considerably below price. This kind of commercial enterprise assumes quite a different complexion in English law, in fact a criminal one. The attempt was unsuccessful owing to the manager's impracticable honesty, but in these days of commissions it is well to be reminded that even an attempt to corrupt the integrity of a servant is a criminal offence.

Jackson v. *Barry Railway Co.* ('93, 1 Ch. (C. A.) 238) resolved itself into a mere question of the proper inference to be drawn from the engineer-arbitrator's letters—whether they showed a disposition on his part to keep an open mind or not. On this judicial views may easily differ, but there can be but one opinion as to the unsatisfactoriness of the position of 'judge in his own cause' which Mr. Barry's double character involved. No doubt the clause is forced on the contractor, but it is all the more necessary that the two capacities should be kept distinct. It is difficult to accept Bowen L.J.'s suggestion that the engineer-arbitrator is any the less to exhibit quâ arbitrator the 'icy impartiality of a Rhadamanthus' or hold less evenly the scales of Justice.

'Bless us, Mercury, from the old enemy, the daring ignorant!' exclaims Selden, and the disappointed legatees in *Collins* v. *Elstone* (67 L. T. R. 624) might well echo the sentiment. The fatal friend who acted in that case the part of unprofessional adviser, admitted with a charming *naïveté* that he bought a form of will from a stationer, *thinking to be more safe*: only he left in the revocation

clause, under the impression that it was of no consequence, and the will being merely a supplementary one, succeeded thus in entirely upsetting the testatrix' intended dispositions. A mistake of law like this by an agent, it is now well settled, is the mistake of the testator, and irremediable (*Morrell* v. *M.* 7 P. D. 68).

Few phrases have been subjected to more microscopic criticism than the 'final judgement' necessary to found a bankruptcy notice under sect. 4 of the Bankruptcy Act. To the long list of what are not final judgements we may now add a decree for dissolution of marriage and payment of costs (*Re Binstead, Ex parte Dale*, '93, 1 Q. B. (C. A.) 199). This surprising conclusion, which the ordinary layman would call legal hair-splitting, is the result of construing the section strictly. No doubt as a quasi penal one it should be so construed in justice to the debtor; but it is a novel thing to hear from Lord Esher of the hardship to the creditor of being dragged into bankruptcy and compelled to accept a composition. The conventional view is that bankruptcy is a benefit to the creditors of an insolvent debtor. They would certainly fare worse if they were left to fight over the assets.

The decision of North J. in *Re Bridger* ('93, 1 Ch. 44) is not likely to escape the criticism of the profession. A testator gives to a hospital such part of his residuary estate 'as may by law be given for charitable purposes.' Does he mean such as may by law be given at the date of making his will, or at the date of his death, when the Mortmain Act, 1891, has enlarged his disposing power? Willes C.J. in *Doe* v. *Underdown* (Willes, 293, 297) lays it down, and Lord Ellenborough in *Doe* v. *Scott* (5 M. & S. 482, 490) fully recognizes the principle, that the 'intent of the testator ought always to be taken as things stood at the time of making his will, and is not to be collected from subsequent accidents which the testator could not then foresee,' and the Court, acting on this principle, is accustomed to seat itself in the testator's armchair. If this is so, the intention (which governs all construction) once so ascertained cannot be artificially enlarged by an Act subsequently passed. So thought Lord Selborne in *Jones* v. *Ogle* (8 Ch. App. 195) and the Court of Appeal in *Mander* v. *Harris* (27 Ch. Div. 166). It would be imputing an intention *dehors* the real intention. Take a country like Chili, where a testator has a disposing power over one-half only of his property. After he has made a will in favour of strangers, trusting to the law's provision for his family, the law is altered, and gives him a disposing power over the whole. Can it be said

that it is his intention to give all to strangers because he leaves his will unaltered? Must he, to displace the operation of the Act, evince a contrary intention?

We do not feel clear that *Watteau* v. *Fenwick*, '93, 1 Q. B. 346, is right. The defendants were the undisclosed principals of a hotel manager who had in fact no authority to buy any goods (except a limited class) for the use of the business from any one but the defendants themselves. The plaintiff, giving credit to the manager alone, supplied goods not within the excepted class. Held by Lord Coleridge C.J. and Wills J. that the defendants were liable for all acts of the manager within the usual apparent authority of an agent conducting that kind of business, notwithstanding that the plaintiff supposed himself to be dealing with a principal. The objection that in such a case there is no holding out at all, and therefore no question of apparent authority, was met by the analogy of a dormant partner. But is a dormant partner liable merely because he is an undisclosed principal? Is it not rather because he is, by the partnership contract, liable to the same extent as the known partners? As to *Edmunds* v. *Bushell*, L. R. 1 Q. B. 97, we have our doubts of that too.

The International Arbitration and Peace Association has been circulating what it calls a 'masterly essay' by Sir Edmund Hornby. His scheme for a permanent international court is both ingenious and—as regards the dignity and emoluments of the proposed members thereof—magnificent. But all writers of this school persistently evade the point that the vital and dangerous differences between nations are precisely those which they will not submit to arbitration. Such arbitrations as have hitherto taken place were successful because the parties had already made up their minds not to fight. On the other hand it is certain that neither France nor Germany would consent to put the Alsace-Lorraine question in the hands of any arbitrator or tribunal whatever. The problem is to educate nations (democracies quite as much as monarchies) to a more peaceful temper. Ventilation of such schemes as Sir Edmund Hornby's may possibly do some good in this direction: we cannot say that we expect it to do much. A more fruitful idea is that of establishing standing treaties of arbitration, as it may be found practicable, between particular nations. Such a treaty between Great Britain and the United States may quite conceivably come out of the Bering Sea arbitration. A network of such treaties might in time cover the civilized world as extradition treaties already do.

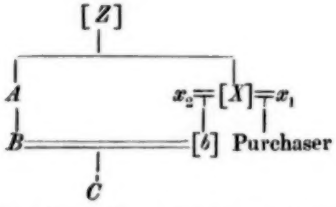
The *Harvard Law Review* for December 1892 contains articles of general interest to all English-speaking lawyers. Prof. Keener contributes the first instalment of what will apparently be the fullest critical investigation of 'Waiver of Tort,' a doctrine which certainly will be none the worse for such thorough criticism as comes out of the Harvard Law School. Mr. Joseph L. Beale, junr., treats of 'The Borderland of Larceny,' and is not afraid to assert that in the latter part of the eighteenth century the judges did not understand the law. He thinks that the whole doctrine of 'larceny by trick' is an anomalous innovation. Certainly Brian C.J. would have thought so; and certainly the language used in the Crown Cases of the last century shows great laxity of ideas. See *e. g.* the note to *R.* v. *Wilkins*, 3 R. R. at p. 724. The same author contributes to the February number a paper on Registration of Title to land. A recent State Commission in Illinois has recommended a system of registering, in the first instance, possessory title only. We are disposed to think this would be the best way in England.

REAL PROPERTY PUZZLE.

(Repeated from p. 21 above.)

A dies, seised in fee simple of Blackacre. He leaves an only son, *B*, who has an only son, *C*; on the death of *A*, Blackacre goes by descent to *C*, his grandson, and not to *B*, his son.

Solution.



The purchaser dies before 1834, *B* marries his cousin *b*, half-sister of the purchaser, who dies before *A*, leaving an only son *C*.

A dies after 1833, and *C* is now the heir of *P*, as representing *P*'s half-sister.

N.B.—If *B* had been married before, *C* might even be a *younger* son of *B*. A. I.

We welcome the appearance of *The Law Record*, a new legal monthly published in Calcutta. This item of news must not be taken as a fair sample:—

'We mentioned in our last issue that the *London County Council*

have determined that hereafter the English Attorney-General and the Solicitor-General may not indulge in private practice, or at least they will be allowed to followed (*sic*) their profession only before the highest Court.'

Also we have to congratulate the *Weekly Notes* on being included by our Calcutta contemporary in a list of 'useful journals,' and *Law Notes* on receiving from it 'the sincerest form of flattery'; but the editors of *Law Notes* appear to think that the imitation has been carried a little too far.

We learn from the *Green Bag* that (among other schools of Western law) a school of English law flourishes in Japan. For the use of the students who can read English text-books 'a number of books were cheaply reprinted and sold at a price within the means of the students.' The list includes the works of two living English authors as to one of whom we are certain, and as to the other we believe, that he was not consulted in any way or even informed of this proceeding. Japan, we believe, is not a party to the Convention of Bern. It would seem that if our Japanese brethren learn some law from England, they have preferred to take their literary morality from America—as it was before the Copyright Act of 1891.

We are glad to have in the *Juridical Review* (Edinburgh) for January a fitting commemorative article on Ihering and Windscheid, from Prof. Rivier of Brussels. When and where, in this generation of minute specialism, will the successor to Ihering's genius be found? Germany can still boast of Mommsen; but there are not many such in or out of Germany.

Mr. G. W. Wilton, who in the same review vilipends Imperial Federation, should provide himself with better arguments than the opinion of the House of Commons in 1870.

We regret to see that Dr. F. Liebermann of Berlin is compelled by other engagements to suspend his reports on English historical literature (including legal history) in the 'Deutsche Zeitschrift für Geschichtswissenschaft.' They were models of condensed and accurate summarizing, and so complete in their survey of the materials, including even unsigned articles in the general literary press, as to give material help not only to Continental but to English scholars. Let us hope that we may be compensated by the earlier production of Dr. Liebermann's new edition of the Anglo-Saxon laws, of which much is expected.

A new scientific review, not actually legal, but not without bearings on the historical and economic aspects of legal study, has been started in Paris by M. René Worms, one of the younger school of Frenchmen who are determined, while not ceasing to be French, to raise the level of French information about the rest of the world. The title of the review is 'Revue internationale de Sociologie,' and the publishers are A. Giard and E. Brière, 16 rue Soufflot.

We are compelled by want of space to hold over several contributions. The only remedy for this state of things would be a sensible increase of the space at our disposal; and this can be achieved only by a considerable increase in our circulation. It rests with our contributors and readers to help us in this respect. If all our contributors would subscribe regularly to this REVIEW (which is one of the least costly of scientific publications) and procure other subscribers, they would be taking the most direct method to prevent the delays they too often have to suffer at present.

It seems convenient to repeat in a conspicuous place that it is not desirable to send MS. on approval without previous communication with the Editor, except in very special circumstances; and that the Editor, except as aforesaid, cannot be in any way answerable for MSS. so sent.

SOME ASPECTS OF LAW TEACHING[1].

OF all the marvellous phenomena of human nature, the most marvellous is, to me, the conscience. This faculty claims a supreme authority over all the other powers of the mind, over all the desires, the emotions, the passions: in all the councils of the mind it sits supreme: upon all the doings and the being of the inner man it passes a retrospective judgement: though often inferior in power, it is always confessedly superior in authority to every passion and every desire of the soul. The picture which human nature presents to the eye of the introspective observer is surely a strange one—a conscience which links us to God and desires and needs which bind us in common with the brutes: a civil war going on, with more or less intensity and with varying fortunes, between the contending faculties, and above all its din and noise the sublime presence of the conscience. Whilst other faculties of the soul listen to the cry of our bodily needs or lend an ear to the suggestions of ambition, or of pride, or of hope, or of fear, conscience in the holy of holies of the soul is aware of an unseen presence, recognises an obligation that has no physical or outward evidence, and hears a mysterious voice—that of duty—herself the 'stern daughter of the voice of God.' Little wonder is it that the Greek tragedian, amidst the many things that are strange, found none stranger than man—

> πολλὰ τὰ δεινὰ κ' οὐδὲν ἀν-
> θρώπου δεινότερον πέλει.

But man is not only a moral being, he is a social being also; and in the societies which he forms, we see writ large the same phenomena which we know in the individual man,—the same passions, the same desires. All the inner conflicts of which I have spoken as existing in the single man, are seen in vast dimensions on the canvas of history and social life, like figures thrown large upon a wall by a low light: and as in the inner man we saw conscience supreme in authority, if not in power, so in society we see law supreme in right even when cast down, overridden and despised in the fierce conflicts of revolution or anarchy. As

[1] An address delivered at the opening of the Law Faculty of University College, Liverpool (Nov. 28, 1892), by the Right Hon. Sir Edward Fry, LL.D., F.R.S.

duty speaks to the individual man through the conscience, so she speaks to man as a social being through the august person of the law. What conscience is in the individual soul, that law is in the body politic.

This statement, if it rested unqualified, would be justly chargeable with error; for to the full height and dignity of conscience, the law can never attain. It must always lag behind it by a long interval, and many things that the conscience prescribes or prohibits are not prescribed or prohibited by the law.

Sin is a vaster thing than crime, and holiness goes far beyond legality. 'Thou shalt not steal' and 'Thou shalt love thy neighbour as thyself' are alike the commands of an enlightened conscience. The breach of the one is the subject of an indictment, but no law can successfully enforce the specific performance of the other. There are some parts of the moral law which *no* social law can enforce at all, there are other parts which no such law can *usefully* enforce; and all these parts go to make up the broad strip of duties enforced by the conscience but not by the law. In the history of jurisprudence one of the most interesting matters of observation is the nearer approach from time to time of the line of social law to the line of individual duty.

From this aspect of the law as a moral thing, I turn to another. The conscience has been speaking to men through the law since society began, and men have accepted what their forefathers have done as binding upon themselves: and thus law is not the utterance of the social conscience in any one generation but the present result of these utterances in all generations which have gone before us. Here we have law as a matter of history. In our own case, as we all know, the treasure which we have received from our ancestors is one not only of most rare workmanship, but of the most varied materials. If the main portion of English Law be of Saxon origin, there are yet to be found in it strains derived from very various sources. I think it probable that a careful investigation may disclose traces of the laws of the Celtic inhabitants of the Island. But however this may be, we all know how the doctrines of the Norman feudalists found a foothold in England with the Norman barons and churchmen; how the Roman Law so far influenced Bracton, that on reading him we sometimes doubt[1] whether the passages which he has taken from Azo are really English Law at all; how through the Ecclesiastical Chancellors both the Canon and the Civil Law were made to contribute to the building up of that great system of Equity which in a clause of the Judicature Act has won its final

[1] [Or more than doubt.—Ed.]

victory over the Common Law of England. The Greeks have left their influence on our maritime laws, and the earliest precedent for a principle which is observed in our distribution of prize of war is in an ordinance of King David, and it is not improbable that the 17th Section of the Statute of Frauds was affected by a practice derived from Phoenicia or Carthage.

Again we can trace in the history of our law, especially as represented in the Statute Book, the varying changes of human opinion on all the great questions which agitate social man. Sometimes so subtle are these changes that they are hidden, as it were, from the eye of the statesman and the lawyer, and are only disclosed by a comparison of the state of things at two distant points of time. What can be more curious in this point of view than the fact that slavery has practically been so blotted out of our legal system, that whereas in the twelfth and thirteenth century nearly all our agricultural labourers were villeins, they were gradually converted into free men, and that, though not without assistance from the Law and from the Church, yet I believe without one line bearing upon it in the Statute Book, or any single decision which can be said to have swept it away. When in the course of last century the case of the boy Somerset came before the courts, England was awakened to find that long years before serfdom had vanished and slavery was not acknowledged by our law. She became, I believe, for the first time fully conscious of the slow change wrought by a variety of subtle influences by which a soil to which innumerable villeins had been bound had been transmuted into a land to touch which is to be free.

The strongest wind leaves no direct impression on the photographic plate; you can see it only in the direction of the leaves or the bending of the trees; so some of the mightiest influences which have worked on society have left no *direct* trace on our legal records, though to the eye of the careful student a hundred precedents disclose the direction in which the hearts and thoughts of men were bent. Thus he who would search well into the history of our law has often a very delicate and subtle task to perform. The 'Zeitgeist' of our own day may be intelligible enough to us, but to read the spirit of past days aright needs a very subtle, a very careful, and a very receptive mind.

I sometimes in my own mind compare the history of the English Law to the history of a living organism through many generations. We know that the living thing is according to the teaching of our modern biologists governed by two principles—the principle of heredity by virtue of which like begets like, and the tendency to variation by reason of which the child is never absolutely like the

parent: that those variations which are useful tend to become permanent and produce a variation in the stock, whilst those variations which are useless tend to disappear (a cause by-the-by assigned for the disappearance of monsters by Empedocles long before Darwin was heard of). In fact each organism is conceived of as a body capable of variation in every possible direction, a centre with an infinite body of rays all around, along each of which at one time or another some member of the species will move, and those variations will perish which are failures, whilst those will survive which are successful. Behind all these tendencies there is some mysterious principle of identity, an unexplained something which justifies us in treating the race as in some sense one and the same.

In our political constitution, the House of Lords represents the principle of heredity, the House of Commons that of variation. The infinite possibilities of legislation are the infinitely numerous lines of possible variation: the Acts of Parliament which pass are the actual variations, the repealed Acts are the failures, the Acts which remain in force are the successes; and the crown represents the mysterious principle of identity which lies beyond all the shifting phenomena of the organism. On the analogy of the body politic with the natural body and on the principles of modern biology, a fair case can I think be made in defence of the English constitution.

The history of English Law, as written in the Statute Book, is one of most profound interest, nor does it contain the history of law only, it contains a vast repertory of information, on the trade, the customs, and the language of our people, the varying political and economical theories which have from time to time prevailed amongst our rulers, and even the personal character and dispositions of our great kings. The Statute Book of the reign of Edward I. contains abundant evidence, as we all know, of the far-reaching character of his reforms. The preambles of the Statutes of Henry VIII, drawn I believe by his own hand, are models of vigorous[1] English in the Tudor days, and of masculine, if not always wise statesmanship.

The inquisitive mind of Daines Barrington found in the Statute Book materials for his curious book of observations; the historical instinct of Mr. Froude clearly saw its vast importance as materials for the history of England, and the thoughtful mind of Mr. Herbert Spencer has found in it evidence in support of the sins with which he has charged our legislature as a body. But notwithstanding these and many other investigations into our Statute Law I am convinced that the mine is still comparatively unworked and that

[1] [But grievously diffuse. And the spelling!—Ed.]

a laborious and philosophical mind may yet draw from it ore of the most precious kind for the illustration of our national life in almost every particular.

In speaking of the statutes it is almost impossible to avoid a comparison between the ancient and modern style of draughtsmanship. The elder statutes may be accused of vagueness, but the modern ones are models of prolixity and confusion. The habit of doing the work that ought to be done by direct language by reference to other statutes[1], the difficulty which such references perpetually create, the obscurity of the language used, the discrepancy not only between different statutes but between different parts of the same statute, all these evils are familiar to those whose duty it is to endeavour to extract from such documents the wisdom of the legislature. Sometimes the practice of legislating by reference is carried many statutes deep. Statute A. refers to Statute B. and B. to C. and C. to D. till the unfortunate reader is absolutely bewildered. Of such legislation, the statute establishing County Councils, one which you would have thought ought to have avoided such confusion and difficulty, is a most impressive example. If the cost and the trouble were confined to the judges who have to expound the statutes, they might be reckoned small: but it is not so, documents which ought to be understanded of the people, and by which their actions are to be regulated are enigmas even to the specialist, and can be unravelled only by a great amount of litigation and at a vast expense. I should be curious to know what are the costs of the litigation caused by that marvellous piece of legislation, the last Bills of Sale Act. I know the causes, or at least some of the causes of the state of things of which I complain, but the evil is none the less a crying one.

In the Statute Book the material lies ready before the writer; an observation which is true of no other department of the history of English Law. If we turn to the department of treatises on the subject, we are forced to confess that our literature is in a state far from satisfactory. We have for instance no decent edition of Bracton, the only great writer of Institutional Law before Sir William Blackstone; or again, turning to the history of decisions, we are in a still worse condition, notwithstanding the vast rows of reports which fill the shelves of every thoroughly equipped lawyer. The Year Books are in a condition which makes them extremely difficult to use, and they need a thorough and laborious editing, a work of which at present I see no prospect; and notwithstanding

[1] [This bad habit is imposed on our recent statutes by considerations of parliamentary tactics. I believe no one dislikes it more than the Parliamentary Counsel themselves.—Ed.]

the labours of Mr. Bigelow, Professor Maitland and the Selden Society, a great volume of early legal decisions outside the Year Books remains inaccessible. A vast mass of ore requires to be brought to bank, washed and crushed before the precious metal can be so extracted as to be fit for the use of the historian of English Law.

But when I look a little further afield I see in like manner materials collecting for the elucidation of some older laws than our own. For instance, the laws of Assyria and Babylon have been more or less disclosed to us by the deciphering of the cuneiform tablets, the jurisprudence of Greece by such discoveries as those of the great fragment of Cretan laws inscribed on a wall at Gortyna and of the various wills and legal documents of the Greek settlers in the Fayoun brought to light by the labours of Dr. Flinders Petrie, so that one can look forward to a time when the philosophical student of the history of law who treads in the steps of the illustrious Sir Henry Maine will have a far wider field from which to draw his inductions than that which was open to the author of Ancient Law, a book on which if I were to presume to pass a criticism it would be to say that the fewness of the laws to which the author had recourse has often appeared to me to throw some doubt upon the safety if not upon the soundness of some of his inductions.

Imperfect as are the materials for the history of law in general, and of English Law in particular, enough is known to show us that many surprises must be in store for us and that many things will come to light which will set us upon new lines of inquiry and thought. Who would have supposed that Aristotle would have given a better definition of equity than any Lord Chancellor of England? What was the condition of Athenian jurisprudence which enabled him to draw his clear line of distinction between Law and Equity? Who would have expected to find the ancient Accadian laws providing for the separate property of a married woman? Who can repress some surprise at finding that the modern rule of Chancery practice by which one of a class is enabled to sue on behalf of all was anticipated by the beneficence of the judges at least as early as Edward III, when they applied the same rule to the writ of monstraverunt by which tenants proceeded against their lord to restrain his encroachments? or who would have supposed that the law of specific performance should find a foothold in a Manorial Court in the Fens of Ely before it was known to the Chancellor or to the Superior Courts, or that the first instances of the jurisdiction should have had to do with contracts to deliver bundles of reeds and to make a rudder?

Again, when the history of law comes to be written with fullness and knowledge, I believe that there will be no more curious or instructive chapter than that in the history of the modes of deciding questions of fact. To many of us it may seem so natural to try such questions by the testimony of witnesses speaking to the very facts in question that any other mode of trial will appear strange and unlikely; and yet I believe that history will show that it is a method of very late growth in England and of comparatively rare existence anywhere; that instead of occurring naturally to men's minds, it has been in fact reached only as the very last resource, as a mere counsel of despair: for instance, in our own country it was only after compurgation, ordeal, single combat, the opinion of the neighbours expressed either by the men of the shire or by the verdict of a jury of the vicinage had all been tried and tried in vain, that recourse was at last had to the dull and painful method of investigating facts by the testimony of witnesses. The history of science will occur to you as offering a close parallel to the course of procedure in the Law Courts; and both will remind you of the observation of the Greek historian that the investigation of truth is so painful to most men that they gladly turn to some other and readier method of satisfying their minds. *Οὕτως ἀταλαίπωρος τοῖς πολλοῖς ἡ ζήτησις τῆς ἀληθείας καὶ ἐπὶ τὰ ἑτοῖμα μᾶλλον τρέπονται.*

Some of you may be inclined to interrupt me here and say, 'What you have said is all very well, but what has it to do with your thesis, the teaching of law? You are occupying us with irrelevant matter.' At first I am inclined to plead guilty to the charge; but I take heart and feel strong enough to repel it, and that on two grounds. For how can I discourse of teaching law unless I know something about law itself, and as I am not prepared with a definition of law in itself or law as it is to be taught in your new faculty, I can only elucidate the matter by some broken and perhaps not very consecutive reflections on the subject. And again I think that I can best approach the question of the teaching of law by indicating some of the lines of thought which are familiar to my own mind in respect of law itself; and lastly, I am sure you will agree with me that law is to be taught by an academic body, such as this college in which I have the honour to speak, in a different method to that in which it can be learned in the offices of a solicitor, or the chambers of a barrister.

I first presented law to you as the representative in the body corporate of the conscience in the individual man. How is the law to be taught in this aspect? Is it—for this is the question which Socrates would have asked—teachable at all? Some laws are

purely positive, and these can only be supported or illustrated by expediency, such for instance as the statute which avoids a Bill of Sale if it transgresses a given form; some are partly moral and partly positive, as the law of the distribution of the personal property of an intestate: the wife and children have moral claims on the property of the deceased: the precise division of the property into particular parts is a matter of positive law; or lastly, some principles of law repose or are supposed to repose upon some direct moral law, as the law which punishes theft or which creates the equity of redemption. Now the moral principle which underlies a law exists, if it exist at all, in the mind and conscience of the pupil, and thence it must be evoked, be called from perhaps unconscious or at least ill-defined existence into conscious and defined existence in his mind. I have chosen the equity of redemption as one of the illustrations of a principle which, if it be justifiable at all, must be justified by an appeal to the conscience, because two recent utterances may serve to illustrate a difficulty for which the teacher must be prepared. Lord Bramwell in one of his last speeches in the House of Lords expressed his disapproval, if not his contempt for a rule of equity which has placed upon the power of the mortgagee a fetter, not to be found in words within the four corners of the deed; whilst, on the contrary, our late Laureate in his last drama of the Foresters has enlisted our feelings against the mortgagee who insists on the legal effect and letter of the deed.

'Ay, ay,' says the Justiciary, 'but you see the bond and the letter of the law. It is stated there that these monies should be paid into the Abbot at York at the end of the month at noon, and they are delivered here in the wild wood an hour after noon.'

To which Maid Marian replies:

> 'The letter, O how often justice drowns
> Between the law and letter of the law!
> O God! I would the letter of the law
> Were some strong fellow here in the wild wood;
> That thou mightst beat him down at quarter staff:
> Have you no pity?'

It seems then that the teacher of law must rely not always on the individual conscience but on what I may call the common conscience of humanity, the *arbitrium boni viri*, the decision of ὁ φρόνιμος. Moreover it is obvious that if law is ever to be taught, we must take care to start clear and strong on certain admitted intuitions of the mind, certain principles which are not to be brought in question. As Euclid cannot advance a step till we have given him his axioms and his postulates without proof, so we shall never get far into law if we are involved in questions of the

freedom of the will, the responsibility of man, the right of property, or the right of the state to control the actions of its members,

> 'For nothing worthy proving can be proven,
> Nor yet disproven.'

Or as the same thought was put in different fashion by a much earlier writer than our late Laureate, *ἁπάντων ζητοῦντες λόγον ἀναιροῦσι λόγον*, they who seek a reason for everything destroy reason, i. e. they destroy the axioms or the intuitions from which all reasoning must begin and without which it has nothing whereon to hang its ever lengthening chain.

It is when we turn to law in its historical aspect that teaching assumes the most direct form of the communication of information, the statement of facts; and as to the best method of teaching of positive law I speak as an outsider, for except with regard to pupils who were in my chambers, I have had no experience in the matter; and yet there are a few observations which I desire to make.

We live in an examining age, and I am of course well aware that most or perhaps all of the students whom I am addressing are looking forward to the use of their knowledge of the law as a means of passing the necessary ordeal before them. Do not, I would venture to say, allow the examinations before you to occupy a large place in your thoughts. Learn in order to know, not in order to answer questions. I am convinced that the character of the learning acquired with a view to the one object is very different from that of the knowledge acquired with a view to the other object. The purpose that is present in the will seems in some strange way to infuse itself into the information which is entering into the intellect and to determine the duration and the thoroughness of the knowledge acquired, as if the desire to retain the knowledge till a given moment only acted like a mordant on a dye, till that time had arrived and no longer, and then the knowledge fades from the fabric of the mind; whereas the desire to learn in order to make the thing learned truly one's own acts as a mordant for all time. Every barrister must know how completely and exactly he is able to retain complicated facts till the case has been heard, and how completely they disappear from his memory and his mind as soon as the judgment-day is over.

Another piece of advice which again I tender from my own experience is this. Of the points which come before you in practice from time to time, select one and try to get to the bottom of it, not only enough for the purpose of advising on the case before you or your teacher, but for the purpose of knowing all that has been decided upon it, and then embody the result of your study in

a concise and logically arranged note. In this way you will get to know all about many particular matters, which will be like islands of light in the original wide sea of your ignorance, and you will acquire a habit of thoroughness in the acquisition of legal knowledge which will stand you in good stead all along. You will find furthermore that the study of a point of law arising on the papers before you is very far superior to the study of a point of law stated independently for your consideration, because nothing so much helps the understanding of law as to see how it is applied to a concrete case. At first to myself as a student, legal propositions often seemed to be all in the air—to be neither true nor false—neither reasonable nor unreasonable, because I did not appreciate their true meaning; but when I saw these applied to actual cases I felt their force and their real import. The student therefore who is in actual contact with legal business appears to me far more likely to learn law thoroughly than the mere academic student; and this advantage I understand that many of you possess. The experience acquired by actual contact with business is to the legal student what clinical instruction is to the young medical man.

From a somewhat similar cause arises the great advantage of teaching by leading cases.

It is hardly even now without a shudder that I can contemplate the vast rows of reports extending from Elizabeth to the present day, nor when I remember to how large an extent our law is founded upon these cases can I wonder at the description of it as

> 'The lawless science of our law
> That codeless myriad of precedent:
> That wilderness of single instances
> Through which a few, by wit or fortune led,
> May beat a pathway out to wealth and fame.'

How is this vast treasure-house of authority best to be unlocked? Mr. Smith answered the question when he published his celebrated leading cases, and gave to the legal world a notion which has been fruitful ever since and has produced a whole library of collections of leading cases on various subjects—the last, but I am sure not the least, in value being the volume of Select Cases on Evidence by Professor Thayer of Harvard University, Cambridge, Massachusetts. By the aid of these leading cases a great amount of authority may be made to fall into easy lines of study.

With regard to cases as authorities, I am very desirous that you should early learn to make the right use of them, because a wrong use of them is extremely common and has a vitality which is very astonishing. Cases are of value only, they are authorities only, so far as they express or imply some distinct proposition of law; they should never be used as authorities for propositions of

fact, never for an inference drawn from facts unless that inference has become a matter of law; they should with comparative rareness be used on questions of the interpretation of documents. Therefore my advice to you is never to leave the study of a case till you have thoroughly sifted out law from fact, and till you have grasped clearly the particular proposition of law for which the case is an authority. Furthermore, I advise you never to cite a case until you have stated to yourself, and if need be to the Court, the proposition for which you cite it. When stated, your proposition will perhaps appear even to yourself irrelevant or self-evident or absurd, in all which cases you will be saved the labour of citation. When your proposition is relevant and not admitted, then and then only your authority will be legitimately cited.

One way in which you may make a great use of cases, I will venture to suggest to you. Take the Report, put your hand over the head note or marginal note, then read the statement of facts and the arguments of counsel, and then stop short; write your own judgement on the case, and then compare what you have written with the judgement actually delivered.

What I have been saying about the method of using cases leads me to a more general observation on method. It is obvious that the acquisition of a good method of study is of infinitely more importance than the acquisition of any one piece of information or of a vast quantity of information. A methodless mind weighted with a mass of undigested learning is as bad an instrument for work as you can conceive of. What then is the good method, and how is it to be acquired? Can it be taught you by your professor, or is it an unteachable thing? To a certain extent the method of each man is his own, and differs from his neighbour's; but the methods of all good workers have at least one element in common —whatever else you are you must be thorough—at however great an expense of time and trouble you should endeavour to get at the bottom of the matter you have to deal with. Get your facts clearly before your mind; you will often find that a strictly chronological arrangement of your facts will throw great light upon them; when you have got your facts, see what are the questions of law which emerge from them, and get these questions stated in your mind clearly and sharply before you attempt their solution. The definite statement of a question will in a great many cases answer the question itself. But if when thus clearly stated to yourself, a question remains, then set to work to solve it from your text-books or your authorities.

For myself I confess that I am a strong believer in the benefit of

the study of logic. I think that it is not only of high value as throwing light upon the structure of the human mind, but that it is a great help in the analysis of complicated matters. But I know that very many successful lawyers regard logic with a measure of pity and scorn.

Now here I can imagine that some of you may be inclined for a second time to interrupt me, and to say 'You are addressing us as if we were solitary students who had to make our way through the dark forest of the law without guides, whereas we are students of this college which has just founded its Faculty of Law; we have our professor and his staff of teachers.' To which I reply, 'Make by all means as much as you can of your academic privileges, and they may do much for you, but they will never take the place of hard individual work. Law lectures, though they lasted all the week through, and law examinations, though they took place once a week, will never alone make real lawyers of you, unless you supplement all those benefits by thought and effort of your own. It is true in matters intellectual as in matters moral, that not that which goeth into the man, but that which cometh out of the man, degrades or elevates him.'

Of the value of lectures on legal subjects I have no right to speak from my experience. I never gave such a lecture, and have attended the smallest number possible: but that much may be learned from them no one can question. No doubt the recent action of the Incorporated Law Society in abolishing all law lectures after seeing them dwindle and almost expire, will occur to many of you as significant of the difficulties which beset the successful teaching of law by oral instruction. Why these lectures have so signally failed I do not know, but I suppose that the 'crammer' was found to pass a greater percentage than the lecturer. Nor do I feel very sure that the system of tuition by correspondence and periodical test examinations is likely to do much more for the promotion of a liberal education in law than the 'crammers' with whom I suppose it is designed to compete. I venture to suggest that lectures should be followed up by mutual cross-examination, by the teacher examining his hearers, and by the hearers cross-examining their teacher. Such a process, which I dare say takes place within these walls, must go far to clear up difficulties which would otherwise remain.

One other warning about lectures let me offer to you. Some students think that it is the same to have a thing in your note-book and in your head. Let me assure you that this is an error. When I was reading in the chambers of a barrister, I had a fellow student who kept a very small note-book in which he made very

short entries of points which arose. The barrister warned him against placing all his reliance on these notes. Of this too he took a note! He did not get very far on in the law. Would it be unkind to add that he went into the Church?

Now I want to say a word about difficulties, little points as they seem to you, which you do not quite understand, because in the investigation of truth or the acquisition of knowledge there is nothing more precious than a little difficulty: it is often the key to the whole matter. First state the difficulty to yourself with the utmost precision of which you are capable, see what is the exact point of ignorance or the exact nature of the opposing inferences. Sometimes the whole difficulty disappears in the effort to state it to yourself. But if it remain, carefully dwell upon it until it either disappears, or as is sometimes the case destroys or subverts the whole structure of argument or inference or conclusion in which at first it appeared only like an insignificant flaw. A difficulty is sometimes of more value than the thing in which it thus seems a mere incident; just as in science a residual phenomena will sometimes pull down the hypothesis which has explained everything else, or as in manufactures the waste product sometimes in the end proves of more value than the product to which it was thought to be mere refuse. The elder naturalists had framed a complete theory of genera and species but neglected variations; and yet these despised variations became in the hands of Mr. Darwin the key to the history of creation. The old gas-workers threw away their gas-tar, but in the hands of the modern chemist this is a product perhaps more valuable than gas itself. The little difficulty that Socrates felt, after he had listened to the eloquent speech of Protagoras on the nature of virtue, grew into an attack on the whole position of the great sophist. And so with you in the investigation of facts, and in the drawing of inferences from them, there must be no little fact left inconsistent with your inferences,—in the statement of a principle of law there must be no possible application of that principle which leads to an impossible or inadmissible conclusion [1].

In this respect, the methods of the lawyer and the man of science are closely akin; to both of them nothing is too small for study or investigation, and this is one (but not the only) reason why to the onlookers their investigations often seem so tedious. They are interested perhaps in the general inquiry, in the broad texture of the argument; but they are impatient whilst the advocate keeps on pulling at some little thread in the fringe: but sometimes the thread unravels the whole web.

[1] ['One should not know of what metal a bell was unless it were well beaten; *quasi dicerst*, by good disputing the law shall be well known:' Hankford J., 11 Hen. IV. 37, cited by Coke on Littleton's *Epilogus*.—Ed.]

You are before long to enter on the practical work of your profession, in the character of barristers or of solicitors. That profession will be a noble or a base one, according to the spirit in which you exercise it. The object of the law is one of the noblest to which our nature can aspire, the ascertainment of truth, the promotion of honesty and of righteousness, the repression of crime, of fraud, of injustice. The technicalities of the law have given occasion, I suppose in all times, for the existence of men who despising all that is noble in their calling, have used all their knowledge, and all their power for unworthy ends, and have too often made the name of lawyer a word of reproach rather than a name of honour. It will be for each one of you to choose in which of the two paths you shall walk as you pursue your calling. If you pursue it in the one way, however great may be your success in the acquisition of business or the accumulation of wealth, you will be mean and contemptible creatures; if in the other way, you will be worthy of your profession and have the blessing of a clear conscience whether or not success attend your efforts. Between these two you must choose, and if you choose the path of virtue, you must not repine if you do not reap the reward of iniquity.

Now and then moral questions of some difficulty may and will occur in your practice, but with an honest desire to do right, you will generally, I believe, feel your way to their solution. I appreciate the duty which every lawyer owes to his client; but I have never been able to accept it in the unqualified terms in which it has been stated by some great lawyers. This duty never can justify deceit or fraud; it can never set you free from the obligation which you owe to truth; it should never allow you to forget all that is bound up in the idea of an English gentleman. The law is good if a man use it lawfully. The law is good, that is, if in the exercise of it your conduct is governed by the higher and the inner law of conscience. In the hope, in the belief that you will so exercise your profession, I wish you each and all God speed.

EDW. FRY.

SUMMARY JURISDICTION: SOME SUGGESTIONS FOR IMPROVEMENT.

IT has always seemed to me an unfortunate occurrence that the proposal to revise the criminal law of this country with the view of codifying it should have been shelved so long. The draft code which was prepared some fourteen or fifteen years ago was a most praiseworthy and able attempt to present in a complete and logical form the effect of our criminal law as it at present exists in the Statute Book and in the reported decisions of the Courts. Whether it is destined to remain for ever as a draft code, or whether under some happy impulse it may once more be placed before Parliament and, revised in the light of more recent experience, be passed into law, is a question which can hardly be answered so long as matters of such moment as those which for the last few years have agitated the country are still undecided.

For the present, therefore, it seems more probable that any improvement in the criminal law must take the form of special and piecemeal legislation rather than that of a comprehensive and general revision. Holding this view, I feel less hesitation in submitting for consideration the following suggestions, in the hope that an opportunity may be found for effecting what I conceive to be much needed improvements in the criminal law, more particularly in that portion of it which falls within the sphere of summary jurisdiction. I am quite content that my proposals should be judged on their own merits. My brief experience as a stipendiary magistrate does not justify me in inviting those who read them to attach any additional importance to them as emanating from one who holds that important position. I may, however, be permitted to say that all of them relate to matters which have forced themselves upon my own attention, and have obtained the approval of many whose experience is far greater than mine.

The first matter to which I wish to call attention has reference to the question of juvenile offenders. Up to a certain point the discretion vested in the magistrate is a fairly wide one. Any child under the age of twelve years, against whom a criminal charge is made, may, without being convicted, be committed to an industrial school, or it may, upon conviction, be committed to a

reformatory, provided that such industrial school or reformatory is willing to receive it. If the child is above the age of twelve, but under the age of sixteen, it may on conviction be committed to such reformatory, though not to an industrial school. But before it can be passed on to the reformatory it must serve a period of imprisonment which may not be less than ten days. There may be some cases where a sentence of imprisonment would be proper, in order to bring home to the child the gravity of the offence of which it has been convicted. But such cases are few and far between, and, speaking from my own experience, I have not come across an instance in which I should have thought it wise to inflict such a sentence had I had any discretion in the matter. I am sure it is unwise to subject every child, whom the magistrate decides to commit to a reformatory, to a preliminary period of imprisonment. If it were left to the discretion of the magistrate whether he should sentence the child to imprisonment or not, I make bold to say that in nine cases out of ten he would decide to send the child direct to the reformatory. That such a course would meet with the approval of the public is clearly proved by the fact that nothing in the administration of justice is more likely to excite severe comment than the committal of a child to prison for even a few days. Where the child is committed to a reformatory, this committal looms larger than the preliminary sentence of imprisonment, and the public attention is diverted from the latter evil, and is more directed to the advantages which it is hoped that a course of reformatory treatment will secure. My first suggestion, therefore, is that a magistrate should have a discretionary power in such cases, and should not be compelled to send a child to prison.

If this point were conceded, my next one ought *a fortiori* to be granted. At present it is practically impossible to commit a child to a reformatory without a remand. If the magistrate decides that the case is one for reformatory treatment, inquiry has to be made whether the child is physically fit for reformatory discipline, and what reformatory, if any, is suited for it, and is willing to receive it. Sometimes, also, a remand is necessary for the purpose of ascertaining whether the surroundings of the child are such that, coupled with the particular offence of which it has been convicted, they constitute a good reason for committing it to a reformatory. In all these cases, if the child is over twelve, it is usual to remand it in custody, which means a commitment to prison during the period of remand. Now if it be conceded that imprisonment is as a rule an unwise form of punishment for a child, it cannot be wise to commit a child to gaol as an unconvicted prisoner. The

only alternative is to allow it out on bail. But such a course is beset with difficulties. It would be absurd to let it out on its own recognizances, while to bind over a parent to produce the child at the end of seven days would be to entrust it to a person who in many cases has been proved to have lost all control over it, or who is extremely reluctant to see it sent away to a reformatory. The chances are that the child would not be forthcoming, and additional trouble would be incurred in its re-apprehension. At present if the child is under twelve it may be committed to the workhouse.

My second suggestion is that any child under the age of sixteen should, if the magistrate thinks fit, be committed to the workhouse when remanded for the purpose of making the inquiries to which I have referred. It would thus be possible in nearly every case to avoid familiarizing a child with prison life and branding it as one who had been in gaol.

There is a third point with regard to the punishment of children under sixteen which is worthy of consideration. At present a court of summary jurisdiction has no power to order a boy who is fourteen or upwards to be whipped. On the other hand, any boy who is under the age of sixteen may be ordered to be whipped by an assize court or a court of quarter sessions. I fail to see any sound reason for this distinction. It creates in practice an unnecessary difficulty in the exercise of a magistrate's duty. For instance, three boys are brought up for some offence which can be dealt with summarily, one being fourteen, the others below that age. Whipping appears to the magistrate to be the most suitable punishment which he can inflict. But while he can order the two younger ones to be whipped, he cannot do so in the case of the elder one, who is probably the ringleader. The latter can only be dealt with by fining him, which would be no punishment to him if his friends pay the fine, or would subject him to imprisonment if the fine be not paid, or by sentencing him to imprisonment, or by committing him to a reformatory. Where, as is often the case, the magistrate is unwilling to inflict either of the latter forms of punishment, his only alternatives are to let the elder boy off altogether, or to commit all three for trial. The former alternative is obviously unfair, the latter causes unnecessary expense. The actual result not unfrequently is that all three are discharged with a caution. I would therefore suggest that a court of summary jurisdiction should have power to order a boy to be whipped who is over ten and under sixteen years of age. I would also suggest that this power should not be limited to cases where the prisoner is charged with an indictable offence, but that it should be a permissible form of

punishment in all cases in which such a boy can be dealt with summarily, or, at all events, in all cases in which the law at present allows a sentence of absolute imprisonment to be inflicted.

There is still another matter with reference to the treatment of children, which has often come under my notice. The industrial schools and the reformatories, though state-aided, are voluntary institutions. They can refuse to receive any child, though the magistrate may desire to commit it to one or other of them. In practice I am met with this refusal only where the medical officer refuses to certify that the child is 'fit for industrial training.' At first sight this seems a valid reason for such refusal. Unfortunately the medical officers are disposed to draw the line a little too strictly. Thus a child who has lost a leg, or a hand, or some fingers, or who is lame or crippled in one arm, has been certified as unfit to be received in such an institution. Such a case as this seems to me to be one particularly fitted for treatment in an industrial school or reformatory. It too often happens that it is just the maimed condition of the child which has directly or indirectly led to its appearance in the dock. It has never been taught to make use of the powers which it has, and has been left to loaf about the streets, picking up as best it can a few coppers by begging, or by the sale of matches or papers. It soon drifts into the company of criminals, and one is not surprised to find it appearing again and again before the Court. To such a child a course of disciplinary training in the use of such bodily or mental powers as it may still possess would be invaluable, and yet under the present system such training can only be secured for it by the intervention of some purely philanthropic institution, which, of course, has no power of detaining it in custody. I would suggest that this point should be brought to the notice of the state-aided institutions, with the view of inducing them to meet more readily the cases of such children. If this is deemed impracticable, it is worthy of consideration whether special institutions should not be established with power to deal with these cases.

I now turn to the adults. The first class of these to which I would refer consists of persons who are brought up on the charge of drunkenness. My objection to the present mode of punishment is that, in the case of inveterate or frequent offenders, it has practically no deterrent or reformatory effect. One offender in Liverpool has been before the Court over three hundred times, and there are others who are running her close in the number of convictions. In such cases as these it is clear that what is wanted is the power of detention for a much longer period, not in gaol, but in some institution of a reformatory character. Prevention, rather than

punishment, should be the object to be aimed at, for it is quite possible that enforced abstention for a lengthened period from the use of intoxicating drink may produce a real reformation. The short periods of imprisonment which at present are the only means open to the magistrate in dealing with such cases are in my opinion utterly useless in bringing about any permanent, or even any temporary reformation of the habit of drinking to excess. These views are, of course, not original, and I do not enlarge upon them. I only desire to add the testimony of even my brief experience to that of others who are more entitled than I am to be heard.

I now pass to another point, which I believe has greater claim to novelty. There are some indictable offences which, if repeated, render the offender liable upon conviction on indictment to a sentence of penal servitude. The effect of the statute is to withdraw from the magistrate at petty sessions the power of dealing with offences which otherwise he might deal with summarily. The object of the statute is to secure the committal of the offender to a Court which has the power, if it choose to exercise it, to inflict a term of penal servitude. It is not difficult to imagine cases where the latter Court would never dream of passing such a sentence. The result is that both at sessions and assizes there are many cases of this class in which the punishment inflicted does not exceed that which might have been inflicted by the Court below. Thus if a man has been convicted of burglary, for which he has received a sentence, however short, at the assizes, and twenty years afterwards the same man is charged with stealing a pair of boots from a shop door, the magistrate is bound to send him for trial, though it is tolerably certain that, so far from getting a sentence of penal servitude, the culprit will not get more than the three months' imprisonment which the magistrate, but for the statute, might have inflicted. Would it be entrusting too great a discretion to the magistrate if he were allowed to decide whether he should deal with the case or should send it for trial? I do not forget that the effect of the present law is to give the offender the chance of a trial by jury. But any person charged with an indictable offence has now, under the Summary Jurisdiction Acts, the unquestioned right to demand a trial by jury, and I do not suggest that the old offender should be deprived of the opportunity which the law, though passed for another purpose, at present gives him. I only suggest that, subject to the provisions of the Summary Jurisdiction Acts, such offender might, if the magistrate thought proper, be left to him to be dealt with. If dealt with summarily, the cost of maintaining the prisoner committed for trial and of prosecuting him at sessions or assizes would be saved. There are very few magistrates,

I fancy, if indeed there are any, who would hesitate to send such a prisoner for trial if there was any reasonable probability of his receiving a more severe sentence than they could inflict. If this proposition is open to doubt, it might be worth while to grant the discretion, as an experiment, to the police and stipendiary magistrates only.

Under the head of procedure I should like to allude to the proposal to allow prisoners and defendants to give evidence on oath, subject to cross-examination. At present, with the exception of cases under the Criminal Law Amendment Act, no prisoner can do so. Under the present state of the law, therefore, it is not strictly legal for any one to ask the prisoner any but the statutory questions. Fortunately this strict view of the law is not always adhered to, and time after time a few judicious remarks or questions addressed by the magistrate to a prisoner succeed in eliciting facts which go to prove his innocence of the charge against him. This departure from the strict letter of the law is all the more venial seeing that if the prisoner be defended no judge hesitates to address such remarks or queries to his advocate. I am sure that, if prisoners were allowed to elect to give evidence subject to cross-examination, the result would be all in favour of the innocent. With regard to the cases of those who appear before the Court as defendants in answer to a summons the law is full of anomalies. One example will suffice. A person who is summoned for keeping a brothel may offer himself as a witness. The master of a vessel, who is charged with overloading his ship, cannot. Yet in the latter case the only person who can give any evidence to explain or to contradict the charge is often the accused, whose mouth is practically closed, for though he may make a statement, and even if he is represented by a legal adviser, I always allow him to do so, if he chooses; there is no legal right to ask him questions, his answers to which would probably clear up the matter, and either convince the Court of his innocence or go some way towards mitigating the penalty. I can only say for myself that in the great majority of cases the questions which I have ventured to put to the accused have elicited answers which told in their favour. I am not advocating the introduction of the French system of interrogation, which is quite opposed to the genius of the English law of procedure, nor have I any fear that the wholesome traditions of our Courts would be violated if the privilege of offering themselves as witnesses subject to cross-examination was conferred upon persons accused. The chance that some guilty persons, who would otherwise have escaped, would be convicted, is not worth considering against the increased certainty that a greater number of

innocent persons would be saved from the risk of being wrongly convicted.

There are a few other points upon which I might offer suggestions, but I prefer to wait until riper experience convinces me that such alteration of the law as I am prepared to advocate would be a real amendment. I only hope that the views which I have ventured to put forward in this paper may be regarded as some contribution toward a possible improvement of the law so far as it affects the powers of a court of summary jurisdiction.

W. J. Stewart.

INTERNATIONAL LAW AND ACTS OF PARLIAMENT[1].

THE whole question of the relation of National to International Law has been much misunderstood, and is indeed not free from difficulty. I propose to-day to confine myself to one branch of this question, asking your attention only to the points of contact between International Law and the Statute Law of England.

For the purposes of our present inquiry the relevant Acts of Parliament might, of course, be taken in their chronological order (and they occur from Magna Charta through most reigns down to the present time); or, adopting the division of topics now usual in treatises on the Law of Nations, we might cite, under each topic, the Statutes which bear upon it; or again, we might distinguish Acts consciously passed with a view to rules of International Law from those the effect of which upon such rules is, as it were, fortuitous.

But it will, I think, be more useful to divide the enactments which we are about to consider, in the first place, into two groups, viz. those which

I. Assert national rights, which may turn out to be internationally controvertible.

II. Provide for the performance of national duties, the conception of which may, perhaps, from an international point of view, be criticized as inadequate.

Legislation of either kind must be vigilantly watched, lest it lead us into diplomatic difficulties. Excess in assertion of Right, and defect in recognition of Duty, may alike prove a *casus belli*.

I. Enactments asserting Rights.

(1) The right which every state has to exist in safety implies a right of regulating the conditions upon which aliens are admitted to, or allowed to remain upon, its territory.

The restrictions imposed by Statute Law upon the arrival of aliens in the United Kingdom (a topic just now of much practical

[1] A public lecture delivered in the University of Oxford, Feb. 15, 1893.

interest) amount to little more than a machinery for obtaining statistics of immigration.

By 6 & 7 Wm. IV. c. 11 (superseding 7 Geo. IV. c. 54) it is provided that the master of any vessel arriving in this realm from foreign parts shall make a declaration to the customs officer as to the names, rank, occupation and description of all aliens on board of, or who shall have landed from, his ship. Each alien is also to make a declaration, and to receive in exchange a certificate: copies of the declaration and certificate to be forwarded to a Secretary of State. Foreign Ministers, &c., are excepted from the operation of the Act, which, after having become almost a dead letter, is now being put in force, but apparently with much laxity; the duty of so doing being often entrusted, according to a statement made on Saturday last in the House of Commons, to 'the ship's carpenter's boy[1].'

The legislation of almost every other civilized country upon this subject is far more stringent; as is the case in some of our own colonies. Thus by the Victorian Chinese Act, 1881, a Chinese immigrant may not land till £10 has been paid for him, and a limit is placed upon the number of Chinese who may be brought in one vessel[2].

The expulsion of aliens, perhaps never effected by the Royal prerogative, has since 33 Geo. III. c. 4, been authorized by temporary Acts of Parliament; such as 11 & 12 Vict. c. 20 (1848), which recites that 'it is expedient, for the due security of the peace and tranquillity of this realm, that provision should be made, for a time to be limited, respecting aliens arriving in, or resident in, this kingdom;' and proceeds to empower a Secretary of State, on information, to order the removal of any alien or aliens, within a year from the passing of the Act and to the end of the next Session of Parliament.'

By the Prevention of Crimes (Ireland) Act, 1882 (45 & 46 Vict. c. 25), sec. 15, the 11 & 12 Vict. c. 20 was re-enacted for the United Kingdom, to continue in force for the same period as the principal Act[3].

It is hardly necessary to call attention to the numerous Acts by

[1] See Stat. Law Rev. Act, 1874, 47 & 48 Vict. c. 43, sec. 4; Parl. Rep. on Aliens, 1843, p. ix; C. Booth, Life and Labour in East London, vol. i. p. 551 (cited 6 L. Q. R. p. 39); and the debate in the House of Commons on Feb. 11, 1893.

[2] See *Musgrove* v. *Chun Teeong Toy*, '91, App. Ca. 272, where the Privy Council expressed an opinion that, apart from the Act, an alien may be prohibited by the prerogative of the Crown from landing on British territory, although diplomatic representations might follow. Cf. 6 L. Q. R. 27, especially a list of enactments restricting Chinese immigration, at p. 41; also 7 L. Q. R. 299.

[3] Cf. the early Acts for the discouragement of alien artificers, 1 Ric. III. c. 9; 21 Hen. VIII. c. 16; 32 Hen. VIII. c. 16. A Commission based upon them was issued by James I, cf. 6 L. Q. R. 27.

which aliens have been disabled from exercising functions of a political character, from holding land, and from owning a British ship; or to the, now mainly obsolete, Navigation Acts, by which the colonial and coasting trades were closed to foreign vessels[1].

On none of these points are we likely to be in conflict with other powers; and it might be supposed that the rights of excluding and of expelling aliens were equally unquestionable. This is, however, not the prevalent view among continental jurists, as sufficiently appears from certain resolutions carried at the Geneva meeting of the 'Institut de Droit International' in September last, by large majorities against those members who maintained that International Law imposes here no limits to the discretion of the several Governments[2].

(2) The right of this country to the allegiance of its subjects is asserted by two groups of statutes, in a way that might easily lead to friction, in cases where the same persons are also claimed as subjects by other states.

The old Common Law doctrine, that all persons born within the Queen's dominions are British subjects, is re-affirmed by the Naturalization Act, 1870, but with important relaxations, practically abolishing another common law rule, expressed in the maxim 'nemo potest exuere patriam suam.' In the first place, any person so born, who was also at his birth the subject of some foreign state, can terminate his British allegiance, by making, when of full age, a declaration of alienage; and, what is more important, any British subject who may voluntarily become naturalized in a foreign state, thereupon ceases (speaking generally) to retain his British nationality.

On the other hand, the old statutory provisions, imposing the quality of British subject upon the children and grandchildren born out of Her Majesty's dominions of British subjects, viz. 25 Ed. I. st. 1; 7 Anne, c. 5, sec. 3; 4 Geo. II. c. 2, sec. 1; 13 Geo. III. c. 21, are still in force, subject to rights of renunciation, or of obtaining foreign naturalization, under the Act of 1870.

(3) A nation's ownership of its territory, properly so called, is too indisputable to need affirmation by Act of Parliament; but we find statutory provisions which imply something very like a limited right of ownership in what are called 'territorial waters.'

So much can perhaps hardly be inferred from the phrase in the Foreign Enlistment Act which includes 'adjacent territorial waters'

[1] By 16 & 17 Vict. c. 107, secs. 324–326, and 18 & 19 Vict. c. 96, sec. 15, where reciprocity is not granted, restrictions may still be imposed on these trades. As to alien clergy, see 27 Eliz. c. 2; 1 Jac. I. c. 4; 10 Geo. IV. c. 7, secs. 28–38.

[2] See the Annuaire de l'Institut, t. viii. p. 166; t. x. p. 227; t. xi. p. 373; t. xii. p. 184.

in the 'dominions' of Her Majesty, but several Acts confirmatory of special Conventions, e. g. 59 Geo. III. c. 38 (as to British America), 31 & 32 Vict. c. 45 (as to the Channel), and 46 & 47 Vict. c. 22 (as to the North Sea Convention), allow only British boats to fish within British territorial waters; and the last mentioned Act gives a generally available definition of the term: 'exclusive fishery limits of the British islands[1].'

The 21 & 22 Vict. c. 109 declares that, as between the Queen and the Prince of Wales, 'all mines and minerals lying below low-water mark', under the open sea, adjacent to but not being part of the county of Cornwall, are vested in Her Majesty the Queen in right of her crown, as part of the soil and territorial possessions of the Crown.'

A bay, the opening of which is twenty miles broad, as is the case with the Bay of Conception in Newfoundland, is not usually supposed to be wholly territorial, but in *The Direct United States Cable Co.* v. *Anglo-American Telegraph Co.* it was held that 59 Geo. III. c. 38 (passed mainly to carry out the Convention of 1818) was such an assertion of British dominion over that Bay as (with 35 & 36 Vict. c. 45, authorizing Newfoundland to legislate with regard to it) could not be gainsaid in a British court. The Privy Council doubted as to the International Law on the subject[2].

(4) The right of the British Crown to exclusive sovereignty and jurisdiction within the realm is asserted by the early Acts against papal encroachments and by the Ecclesiastical Titles Act, 1851[3]. Also by the bulk of our criminal law, which contains no exceptions in favour of aliens, as to offences committed on land within the British dominions, or on board of British ships upon the high seas. Our Government had lately occasion to remind that of the United States of the necessary applicability of the 'Coercion Acts' to American citizens who might happen to be in Ireland.

A claim to jurisdiction, growing out of past employment in a British ship, which one might suppose would prove internationally untenable, is contained in sec. 267 of the Merchant Shipping Act, 1854, viz. that 'all offences against property or person, committed *at any place*, ashore or afloat, out of Her Majesty's dominions, by any . . . seaman, who, at the time when the offence is committed, is, *or within three months previously* has been, employed in any British ship, shall be' (in effect) triable as if committed within the jurisdiction of the Admiralty of England.

[1] The Convention, incorporated in the Act, fixes the limit at three miles, and for bays at ten.
[2] L. R. 2 App. Ca. 394.
[3] 14 & 15 Vict. c. 60, repealed 1871, but with savings.

Three extensions of this right are deserving of attention:

(i) For many purposes the British Crown claims to exercise jurisdiction over aliens and alien vessels, not only within its dominions, but also within the waters which wash the coasts of its dominions, to a distance of three miles from low-water mark. I have already mentioned that something very like a right of ownership in those waters is asserted by the claim to exclusive fishery therein.

A less questionable right, viz. one of jurisdiction, is asserted over these waters for the following purposes, viz.: (1) the prohibition of hostilities; (2) the enforcement of quarantine; (3) the prevention of smuggling; (4) the police of fisheries; and (5) the application to even passing vessels of English criminal law.

1. The principle under which a neutral state prohibits the occurrence of hostilities within three miles of its coasts is clearly laid down in the Foreign Enlistment Act, 1870.

2. By 6 Geo. IV. c. 78, and subsequent Acts, any vessel on arriving within even six miles of the coasts of the United Kingdom is obliged to display a signal denoting its sanitary condition, and men-of-war may oblige an infected vessel to repair to a port appointed for the performance of quarantine, if necessary, 'by firing guns upon such vessel' (cf. 30 & 31 Vict. c. 101, sec. 56, and 38 & 39 Vict. c. 55, sec. 343, &c.).

3. For the prevention of smuggling, the repealed Hovering Act, 9 Geo. II. c. 35 (1736), sec. 22, assumed a revenue jurisdiction of four leagues from the coast, by prohibiting the transhipment of foreign goods within that distance. It has however been supposed in more recent times that so extensive a jurisdiction could not be asserted with reference to any foreign ship the government of whose country chose to object to its exercise; and in the Customs Consolidation Act, 1876 (39 & 40 Vict. c. 36), sec. 179, the claim of jurisdiction, as against foreign vessels and foreigners, is limited to a distance of one league from the coast [1].

Somewhat analogous to the Hovering Acts was 56 Geo. III. c. 23, 'An Act for regulating the intercourse of the island of St. Helena, &c.' (1816) which recites the necessity of prohibiting all communication with the island, either by Her Majesty's subjects or any other persons, except, &c.; and enacts that, while Bonaparte is detained there, no ship, though belonging to foreigners, may be found hovering within eight leagues of the coast thereof, on pain of forfeiture, should it not depart after being warned.

The United States have lately recalled attention to this Act, as a precedent for their own legislation with reference to the Behring Sea. It may be sufficient to point out that the British

[1] Cf. *Le Louis*, 2 Dods. 244; *Church* v. *Hubbard*, 2 Cranch, 187.

Act threw no impediment in the way of ships pursuing their lawful voyage through the waters in the neighbourhood of St. Helena, but was directed, under most exceptional circumstances, solely against vessels loitering with an apparent intent to interfere with a matter of what was regarded of almost international concern, and in which England was acting as the mandatory of the European powers. Whether the statute would have been enforced in any case in which the United States had thought fit to protest against its application it is not easy to say.

4. A claim to exercise a police supervision over fisheries carried on in British waters is included, *a fortiori*, in the claim, already considered, of an exclusive right to fish in those waters. In so far as under two Acts of Parliament, 28 & 29 Vict. c. 22, sec. 2, and 45 & 46 Vict. c. 7, sec. 5, to which also the United States have obligingly recalled our attention, a police superintendence is asserted over an extent of sea off the North of Scotland considerably in excess of the three mile limit, we can only say that the powers given by these Acts would be judicially interpreted, upon the principles to be presently mentioned, so as not to apply to the boats of foreigners [1].

The 48 & 49 Vict. c. 60, 'An Act to constitute a federal council for Australia,' sec. 15, gives power to the Council to legislate as to: '(*e*) Fisheries in Australian waters beyond territorial limits'; but bills exercising this power are to be reserved for the signification of Her Majesty's pleasure. An Act was accordingly made, 51 Vict. No. 1, to which the Queen's assent was given, extending to Australian waters beyond the territorial jurisdiction of the colony of Queensland, certain provisions of the Queensland Acts relating to the pearl fishery. And a similar Act was passed in the following year with reference to the extra-territorial waters of Western Australia. The United States cite these Acts in the Behring Sea controversy, but it must be remarked that the recital in each case refers to such provisions only of the colonial Acts as are 'applicable to extra-territorial waters,' and the operation of 51 Vict. No. 1 is expressly limited to British vessels.

5. Till fourteen years ago it was doubtful whether the jurisdiction of English courts extended, and whether the criminal law of England was applicable, to offences committed on board, or by means of, a foreign ship, being at the time on the open sea within three miles from the coast; and although the question is now settled, so far as it can be, by the legislature of this country, it still remains open as a question of International Law.

[1] The Act 28 & 29 Vict. c. 22, sec. 2 specifies: 'Between the points of Ardnamurchan on the north and the mull of Galloway on the south;' and empowers the making of similar rules to operate 'within any other limits of locality on the coasts of Scotland.'

It is true that the Foreign Enlistment Act, in dealing with offences against its provisions within 'territorial waters,' makes no exception in favour of aliens or of foreign vessels, but this Act was passed with special reference to the performance of certain international duties; and the applicability of English criminal law generally to foreign vessels in territorial waters was debated for the first time in the case of *Reg.* v. *Keyn*, when the German captain of a German vessel was tried for causing, by his negligent navigation, when less than three miles from the English coast, the loss of a vessel with which he came into collision, and thereby the death of a passenger on board of her. The case was twice argued before the Court for Crown Cases Reserved, which eventually, in November 1876, quashed the indictment, on the ground that whether or no a state has by International Law a right to extend its criminal jurisdiction over the high seas within three miles of its coasts, this country, at all events, had never done so [1].

The Territorial Waters Jurisdiction Act, 1878, was the result of the decision in this celebrated case. Under certain safeguards it confers jurisdiction upon British courts in respect of any offence committed within three miles of the coasts of Her Majesty's dominions, although committed on board, or by means of, a foreign ship. This Act has been much criticized, and the assertion of jurisdiction which it contains is said by many, and especially by German authorities, to be in contravention of International Law [2].

ii. The jurisdiction of Great Britain, as of other Christian states, is exercisable within the territory of the Ottoman empire, by virtue of special concessions, usually described as 'capitulations,' and within the territories of other Oriental powers such as China, Japan, and Siam, by virtue of similar grants.

The exercise of the jurisdiction thus conceded has been provided for by a series of Acts of Parliament, beginning in 1843, but now superseded by the Foreign Jurisdiction Act, 1890 (53 & 54 Vict. c. 37), which recites that 'by treaty, capitulation, grant, usage, sufferance, and other lawful means, Her Majesty the Queen has jurisdiction within divers foreign countries,' and enacts that such jurisdiction may be exercised 'in the same and as ample a manner as if Her Majesty had acquired that jurisdiction by the cession or conquest of territory [3].'

[1] L. R. 2 Ex. D. 63.

[2] E. g. Perels, Das internationale öffentliche Seerecht der Gegenwart, sec. 13.

[3] By 'capitulations,' &c., one Western state can acquire no jurisdiction over the subjects of another Western state, except by their voluntary submission to it. The *Laconia*, 2 Moo., P. C. 185. In disputes in Oriental countries 'actor sequitur forum rei' (the plaintiff thus submits himself to the consular jurisdiction of the defendant). But such cases are usually tried by mixed tribunals; cf. Lawrence, Commentaire sur Wheaton, t. iv. p. 163; Halleck, i. p. 344.

iii. There are also various Acts which confer upon Her Majesty jurisdiction over British subjects in countries where there is no civilized government. For instance, 24 & 25 Vict. c. 31 and 34 & 35 Vict. c. 8, with reference to places in West Africa djacent to Sierra Leone; 26 & 27 Vict. c. 35, as to territories in South Africa, southward of the 25th degree of S. latitude, and not within the jurisdiction of any civilized government; 35 & 36 Vict. c. 19, sec. 19 and 38 & 39 Vict. c. 51, secs. 4, 5, as to islands in the Pacific. And there is now a general provision upon the subject in sec. 2 of the Foreign Jurisdiction Act, 1890, already mentioned.

An Order in Council of May 9, 1891, reciting the certain territories in South Africa are 'under the protection of Her Majesty the Queen,' and that 'by treaty, grant, usage, sufferance, and other lawful means, Her Majesty has power and jurisdiction in the said territories,' proceeds, 'by virtue of, and in exercise of the powers by the Foreign Jurisdiction Act, 1890, *or otherwise*, in Her Majesty vested,' to empower the High Commissioner accordingly. Our Government assumes that it has the right, in Protectorates, to exercise jurisdiction over subjects of outside states, the consent of which is presumed.

II. Enactments in aid of the Performance of Duties.

We have next to consider legislation which strengthens the hands of our Government for the performance of its international duties. These may either exist apart from treaty, or may arise from treaty.

i. In support of duties existing apart from treaty. One of the most important statutes of this kind is the 7 Anne, c. 12, with reference to the privileges of Ambassadors. Its history is curious.

On July 21, 1708, the Russian minister, Matueof, was arrested for debt in the city of London, dragged from his coach, and committed to a spunging-house. The persons concerned were on July 25 examined before the Privy Council (of which Holt C.J. was at the same time sworn a member), and seventeen of them were sent to prison. Most of these were proceeded against in the Queen's Bench on the information of the Attorney-General. They were tried before Holt, February 14, 1708–9, and convicted by the jury. The point of law as to the character of their offence was reserved, but never argued. A Bill dealing with the question was already under discussion in the House of Commons[1], but as read a first time, February 2, 1708–9,

[1] Leave was given for its introduction, Dec. 23, 1708.

was not satisfactory to the *corps diplomatique*. They wished definite penalties to be prescribed by the Bill, and founded 'sur les principes du droit des gens, dont on n'y fait point mention.' They proceed: 'Il importe donc d'ajouter aux mots': 'to prevent similar acts of violence for the future,' the words, 'Contraires au droit des gens et aux priviléges accordés de tout temps aux Ambassadeurs et autres ministres publics, reconnus et autorisés comme tels, ainsi qu'à ceux des rois ou reines de la Grande Bretagne dans les cours étrangères[1].' Words to this effect were accordingly inserted in the preamble, though not, as suggested, in the enacting part, of the Bill, before it received the royal assent on April 21, 1709. The Czar, Peter the Great, who had at first demanded that the punishment of death should be instantly inflicted upon the offenders, was appeased by receiving from the hands of an ambassador extraordinary an elegantly illuminated copy of the Act of Parliament, accompanied by an explanatory letter from Queen Anne.

Ambassadors are exempted from the payment of land-tax by 38 Geo. III. c. 5, sec. 46, and there are private Acts upon the subject.

Though it can hardly be said to be an international duty, in the strict sense of the term, to maintain diplomatic intercourse with any given state, yet the refusal to do so is no doubt unfriendly. We may therefore take notice here of the Act (11 & 12 Vict. c. 108) passed in 1848 to remove any statutory difficulties in the way of such intercourse between Her Majesty and 'the Sovereign of the Roman States.' The Pope being no longer a temporal Sovereign, this Act was treated as 'spent,' and repealed by the Statute Law Revision Act of 1875.

By the Offences against the person Act, 24 & 25 Vict. c. 100, sec. 4, 'all persons who shall conspire, &c., to murder any person, whether he be a subject of Her Majesty or not, and whether he be within the Queen's dominions or not, and whosoever shall solicit, &c., any person to murder any other person, whether he be a subject of Her Majesty or not, and whether he be within the Queen's dominions or not, shall be guilty of a misdemeanour.' Under this Act a conspiracy by a foreigner to assassinate a foreign sovereign could be dealt with, which was doubtful when in 1858 Dr. Bernard was tried, under 9 Geo. IV. c. 31, as accessory before the fact to the murders caused by the shell thrown by Orsini at Paris.

Certain Acts of Parliament have been passed to facilitate the performance by this country of international duties which arise only in time of war. Thus the treatment of enemy subjects, found within the realm on the outbreak of hostilities, is provided for by

[1] Martens, Causes Célèbres, i. 73.

a well-known clause of Magna Charta (25 Ed. I. art. 30, confirming 9 Hen. III.), which is still in force. This clause provides also for the treatment of aliens in time of peace.

Breach of truce and safe-conduct was punished by 2 Hen. V. st. 1, c. 6.

With reference to the conduct of actual warfare: The Army Act, 1881 (44 & 45 Vict. c. 58), consolidating former Acts, sec. 6 (1), treats as an offender any person subject to martial law who—

> '(*f*) does violence to any person bringing provisions or supplies to the forces; or commits any offence against the property or person of any inhabitant of, or resident in, the country in which he is serving;'
>
> Or '(*g*) breaks into any house or other place in search of plunder.'

The Naval Discipline Act, 1866, sec. 40, prohibits ill treatment of the officers and crew of a Prize. Letters of marque were forfeited for cruelty under the temporary Act, 55 Geo. III. c. 160.

The performance by Great Britain of her duties as a neutral is mainly provided for by the Foreign Enlistment Act, 1870, superseding the Act of 1819, which was an imitation of the United States Act of 1818, still in force.

It is a well-known chapter of history, and in any case is a story too long to be told to-day, how the inadequacy of the old Foreign Enlistment Act to enable us to fulfil the alleged duties of a neutral during the American civil war contributed to produce those differences with the United States which were only settled by the Geneva Arbitration. The Report of the Royal Commission which led to the legislation of 1870 is a most instructive commentary on the danger of allowing municipal law to lag behind the requirements of international obligation. The power of prohibiting 'the carriage coastwise' of certain goods, conferred upon the Crown by the Customs Consolidation Act, 1853, 16 & 17 Vict. c. 107, sec. 150, is intended rather for the protection of Great Britain when belligerent, than for enabling her better to fulfil her duties when neutral.

ii. For the better performance of duties arising out of Treaty.

(*a*) In some cases the obligatory character of the Treaty is expressly made to depend upon its being followed by legislation. So by the Extradition Convention with France of 1852 'Her British Majesty engages to recommend to Parliament to pass an Act to enable her to carry into execution the Articles of the present Convention;' and it was provided that 'when such an

Act shall have been passed, the Convention shall come into operation, from and after a day to be fixed.'

Similarly, the cession of Heligoland by the Convention of 1890 was made 'subject to the assent of Parliament.' In the former case the necessary legislation was refused. In the latter case it was accorded, by 53 & 54 Vict. c. 32.

(β) In other cases, although the Treaty is diplomatically binding, it cannot be carried into practical effect without an Act of Parliament. This was the case with the older Extradition Conventions, and effect was accordingly given to the Conventions of 1842 with the United States and of 1843 with France by 6 & 7 Vict. cc. 76 and 75 respectively [1].

So the Foreign Deserters Act, 1852 (15 & 16 Vict. c. 26), provides for carrying into effect 'arrangements made with certain foreign powers for the recovery of seamen, not being slaves, deserting from the ships of such powers when in British ports, and for the recovery of seamen deserting from British ships when in the ports of such powers.'

Legislation has also been necessary in the case of numerous Fishery Conventions, e.g. 59 Geo. III. c. 38, 'An Act to enable Her Majesty to make regulations with respect to ... Newfoundland, &c., according to a Convention made with the United States;' 35 & 36 Vict. c. 45, to carry out the Fishery provisions of the Treaty of Washington of 1871; 31 & 32 Vict. c. 45, to carry out the Sea Fisheries Convention with France of 1867; 46 & 47 Vict. c. 22 [2] and 54 & 55 Vict. c. 37, as to the North Sea Fisheries.

As to the Slave Trade, see 5 Geo. IV. c. 113, and 36 & 37 Vict. c. 88.

As to Submarine Telegraphs, see 48 & 49 Vict. c. 49.

As to International Copyright, &c., 15 & 16 Vict. c. 12, and subsequent Acts.

As to Mail Ships, 54 & 55 Vict. c. 31.

A series of Acts by which the Government of this country has been empowered to perform its Treaty engagements with France, in respect of the fishery rights of the latter country upon the coast of Newfoundland, have an important bearing upon controversies now pending.

The 28 Geo. III. c. 35, passed to give effect to the provisions of the Treaty of Versailles of 1783, was put an end to by the outbreak of war with France, and was accordingly included in the Statute Law Revision Act, 1871. The 5 Geo. IV. c. 51, sec. 12,

[1] Similar legislation may be needed even in the United States, where a treaty is equivalent to an Act of Congress. Cf. Wharton, Dig. sec. 138.

[2] Art. 6 is an instance of an express engagement to propose the necessary legislation.

passed to safeguard the revived rights of the French fishermen under the Treaty of 1814, was continued by 2 & 3 Wm. IV. c. 79 till Dec. 3, 1834, when it was allowed to lapse. A judgement of the Supreme Court of Newfoundland, since confirmed by the Privy Council[1], having shown the inadequacy of the common law powers of the Crown to authorize such measures as were thought necessary under a *modus vivendi* to which the two nations concerned had agreed, pending the settlement of their differences by arbitration, and the colony refusing to cure the defect by local legislation, a Bill for this purpose was introduced into the House of Lords on March 19, 1891. On the May 28 following the House of Commons resolved not to proceed with the second reading of the Bill, information having been received that the necessary powers had been granted by an Act of the Newfoundland legislature, which was however to remain in force for two years only[2].

(γ) Sometimes the Act is of an enabling character, preceding, and limiting the scope of, treaties for the due performance of which it provides machinery. E. g. the Extradition Acts, 1870, 1873, the Act for the ascertainment of foreign law, and for giving information to foreign courts as to British law (24 & 25 Vict. c. 11), and the Foreign Deserters Act, 1852.

(δ) The Act may be passed with a view to an arrangement still under negotiation. So the Seal Fishery (Behring Sea) Act, 1891 (54 Vict. c. 19), was passed on June 11, 1891, in support of the *modus vivendi* signed on the 15th of the same month.

I have now directed your attention in detail to certain Acts of Parliament, which may be taken as samples of a larger number, bearing upon our rights and duties towards foreign governments. But it will be necessary to supplement what has been said by some remarks of a more general character.

(α) We must observe, in the first place, that in no case can the rights asserted, or the duties acknowledged, by such Acts as those under consideration be taken as precisely measuring the international rights or duties of this country.

The claim of right made may well be something less than this country thinks itself entitled to assert; while the provision made for the performance of duty is almost always, *ex abundanti cautela*, in excess of what we are prepared to admit could be internationally demanded from us.

[1] See *Walker* v. *Baird*, '92, App. Ca. 491. The Privy Council avoids expressing an opinion upon the right of the Crown to make treaties of all kinds, and of compelling its subjects to observe them.

[2] Hansard, vol. 353, pp. 1210–1245.

(β) We may notice next, what has no doubt already become obvious, the fragmentary character of our legislation upon points of international interest. We have statutory enactments only upon points which have happened to call to them the attention of Parliament; while points of equal importance, but which have not attained this accidental prominence, have been left to the operation of the Common Law.

(γ) Notice again, that any express recognition of International Law in an Act of Parliament is extremely rare. The term 'Law of Nations' makes its appearance, as I have already stated, for the first time in the Statute of Anne on the privileges of Embassy, and then was inserted only under pressure from the *corps diplomatique* in London. It occurs again in 55 Geo. III. c. 160, sec. 58, in the Naval Prize Act of 1864, and in the Territorial Waters Jurisdiction Act, 1878; hardly elsewhere.

The newer term 'International Law' is, I think, not met with before the Territorial Waters Jurisdiction Act. It recurs in the Sea Fisheries Act, 1883. A few distinctly international terms may be met with in the Statute-Book, but they are few indeed. 'Neutral ship' is found in 43 Geo. III. c. 153, sec. 15, and in the preamble of 48 Geo. III. c. 37. 'A proclamation of Neutrality' occurs in sec. 8, and 'in violation of the Neutrality of the Realm,' in sec. 14 of the Foreign Enlistment Act, 1870. No such phrase is to be found in the Act of 1819. 'Belligerent' occurs in the Naval Prize Act, 1854, sec. 52, in the Foreign Enlistment Act, 1870, secs. 2, 14, and in the Territorial Waters Jurisdiction Act, 1878, secs. 2, 14. The Sea Fisheries Act, 1883, sec. 28, defines the term 'exclusive fishery limits of the British islands.' But for these, and perhaps two or three other phrases of a similar nature, to be gleaned only by somewhat minute research, and but for a frequent and explicit reference to the binding obligation of treaties, the language of the Statute Book would lead us to suppose that the legislator was intent only upon the maintenance of British interests, with an occasional somewhat condescending allusion to 'Powers with which Her Majesty is at peace,' never troubling himself about that delicately poised balance between domestic and foreign rights which is known as 'International Law.'

(δ) I have reserved for the last a question which would be answered by judges of the present day in much clearer language than was employed by some of their predecessors: the question—how is a British Court to treat an Act of Parliament which conflicts with a rule of International Law? The same question may, of course, arise with reference to Acts of Colonial Legislatures, and to Orders in Council.

The 'Law of Nations' (which I may venture to define as the public opinion of the Governments of the civilized world, with reference to the rights which any state would be justified in vindicating for itself by a resort to arms) is, no doubt, incorporated into the Common Law which binds the Courts of this country. As the 'Law of Nations,' it is, of course, insusceptible of modification by an Act of the British Parliament. The Act can neither bestow upon this country any international right to which it would not otherwise be entitled, nor relieve our Government from any of its diplomatic responsibilities. So Lord Mansfield lays down that the Act of 7 Anne, c. 12 'did not intend to alter, *nor can alter*, the Law of Nations[1].' But the question to which I wish to call your attention has reference not to the contents of the Law of Nations, but to the claims of the Law to the obedience of a British Court. If it can only claim obedience there through its incorporation into the Common Law of the realm, we should expect to find that, like any other branch of the Common Law, it will be disregarded by our judges when it comes into conflict with an express enactment of the legislature.

The contrary view has hardly found expression in any of the ordinary Courts of Law or Equity (when indeed one would be as much surprised to meet with it as with any judicial acceptance of Lord Coke's *dicta* as to the nullity of an Act of Parliament which should contravene 'Common Right and Reason')[2], although our judges are very careful to presume in favour of such a construction of an Act of Parliament as is consistent with the generally admitted rights of other nations. So it was said by Turner L.J. in *Cope* v. *Doherty*[3]: 'It is not, I think, to be presumed that the British Parliament could intend to legislate as to the rights and liabilities of foreigners. In order to warrant such a conclusion, I think that either the words of the Act ought to be express, or the context of it very clear[4].'

But Courts of Admiralty, especially when invested with Prize jurisdiction, have been wont to entertain somewhat hazy notions as to the authority under which they were sitting. Perhaps some ground for the views entertained by them is afforded by the Commission which authorizes and requires Courts of Prize to proceed 'according to the course of Admiralty and the Law of

[1] *Heathfield* v. *Chilton*, 4 Burr. 2016.
[2] 8 Rep. 118. Cf. Lord Holt in *London* v. *Wood*, 12 Mod. 687.
[3] 4 K. & J. 367.
[4] So Lord Hatherley (as Vice-Chancellor) in the *General Iron Screw Co.* v. *Schurmans*, 1 Joh. & Hem. 180. 'A foreign ship meeting a British ship on the open ocean cannot properly be abridged of her rights by an Act of the British Legislature.' Cf. the *Saxonia*, 15 Moo., P. C. 262.

Nations.' There are, accordingly, to be found judicial *dicta* which would seem to imply that the business of a Prize Court is to administer a sort of cosmopolitan justice, which Acts of Parliament are powerless to distort.

In the *Maria* (1799), Lord Stowell said: 'The seat of judicial authority is, indeed, locally *here*, in the belligerent country, according to the known law and practice of nations: but the law itself has no locality. It is the duty of the person who sits here to determine this question exactly as he would determine the same question if sitting at Stockholm[1].'

In the *Recovery* (1807), the same judge said: 'This is a Court of the Law of Nations, though sitting here under the authority of the King of Great Britain. It belongs to other nations as well as to our own; and what foreigners have a right to demand from it is the administration of the law of nations, simply, and exclusively of principles borrowed from our own municipal jurisprudence, to which, it is well known, they have at all times expressed no inconsiderable repugnance.' He therefore refused, on the ground of want of competent jurisdiction in the Prize Court, to apply to a foreign vessel the provisions of the Navigation Act against trading with the East Indies[2].

In the *Minerva* (*circa* 1807) Sir J. Mackintosh, then Recorder of Bombay, and acting under a Commission of Prize, spoke of its being 'the duty of the judge to disregard the "instructions," supposing them "illegal," and to consult only that universal law to which all civilized Princes and States acknowledge themselves to be subject.' . . . 'In the case (which had hitherto been, and he trusted would continue, imaginary) of such illegal instructions, he was convinced that English Courts of Admiralty would as much assert their independence of arbitrary mandates as English Courts of Common Law, &c.[3]'

In the *Fox* (1811), the language of Lord Stowell is more cautious, one may perhaps add more obscure, than that which is found in the judgements just cited. He labours to show that 'these two propositions, that the Court is bound to administer the Law of Nations, and that it is bound to enforce the King's Orders in Council, are not at all inconsistent with each other,' by the violent assumption that these orders and instructions will always conform themselves, under the given circumstances, to the principles of the unwritten law which is binding on the Court. He declined to speculate as to the duty of the Court in case of a conflict between the two authorities, because he could not 'without

[1] 1 Rob. at p. 350. [2] 6 Rob. 348. [3] Life, i. p. 317.

extreme indecency, presume that any such emergency would happen[1].'

The language of Sir Robert Phillimore, in commenting upon these decisions, shows to what lengths an Admiralty judge of our own day was prepared to carry the views suggested by them.

'It is clear,' says the learned judge, 'that it has never been the doctrine of the British Prize Courts that, because they sit under the authority of the Crown, the Crown has authority to prescribe to them rules which violate International Law.' Again: 'If he [Lord Stowell] had not so considered them [i. e. considered the Orders in Council to be consistent with International Law] and nevertheless had executed them, he would have incurred the same guilt, and deserved the same reprehension, as the judge of a municipal Court, who executed by his sentence an edict of the legislature which plainly violated the law written by the Creator upon the conscience of his creature[2].'

Even in exercising the 'instance jurisdiction' of the Court of Admiralty, i. e. when not sitting as a Court of Prize, Lord Stowell seems to have consistently declined to apply Acts of Parliament in a sense in which they would have contravened International Law. As he said in *Le Louis*, 'The legislature must be understood to have contemplated all that was within its power, and no more[3].'

The latest authoritative utterance of the Court of Admiralty upon the subject is probably to be found in the case of the *Annapolis*; in which, after stating that Parliament has not, according to public law, any authority to legislate for foreign vessels on the High Seas, Dr. Lushington adds: 'though, if Parliament thought fit to do so, the Court, in its instance jurisdiction at any rate, would be bound to obey. In cases admitting of doubt, the presumption would be that Parliament intended to legislate without violating any rule of International Law[4].'

The result of the cases cited may be summed up as follows:—

1. An Act of Parliament will be so construed, if possible, as not to conflict with a rule of International Law.

2. If it plainly does so conflict, it, and not International Law, must be obeyed in all Courts, except, as seems to be held both by Lord Stowell and by Dr. Lushington, in a Court of Prize.

[1] Edwards, 312. Cf. *Nostra Signora de los dolores* (1813) 1 Dods. 290: 'as against subjects of other countries it (26 Geo. III. c. 60) has no such force.' This was an Admiralty case. Lord Stowell says it was brought 'in a Court whose duty it is to administer the Law of Nations.'

[2] 3 Phill. Int. Law, sec. 436.

[3] (1817) 2 Dods. 239. The captor's commission here was founded on the Slave Trade Act, 51 Geo. III. c. 23. Cf. the *Karl Johann*, cited in the *Girolamo*, 3 Hagg. Adm. and *Nostra Signora de los dolores*, u. supra.

[4] 30 L. J. Pr. M. & Ad. 201.

This exception, we may venture to predict, will prove to be non-existent. It is now more clearly understood than it was when the question was raised before Lord Stowell, that the powers of all British Courts are derived from, and must be exercised only in conformity with, British law; which when it speaks as an Act of Parliament negatives the possibility of any doctrine in contravention of the Act being British law by tacit adoption [1].

3. It is, on the other hand, quite certain that no Act of Parliament, or decision given in accordance with its provisions, will relieve this country from liability for any results of the Act, or decision, which may be injurious to the rights of other countries.

I have been able to deal only with the salient features of a topic upon which little has hitherto been said or written; but have perhaps said enough to suggest the necessity for some study of the limits which are imposed upon national legislation by the principles of International Law.

T. E. HOLLAND.

[1] Even A. Gentili says, as to the authority of the Civil Law in the Court of Admiralty: 'Ut sic ego iura haec distinguo. Non appello alterum Anglicum, alterum autem Romanum, nec enim in regno principe aliud ius fit quam regni ipsius.' (Adv. Hisp. i. c. xxi. p. 95.) Lord Chief Justice Cockburn states the principle in the broadest possible manner: 'If the legislature of a particular country should think fit by express enactment to render foreigners subject to its law, with reference to offences committed without the limits of its territory, it would be incumbent upon the courts of such country to give effect to such enactment, leaving it to the state to settle the question of International Law with the governments of other nations.' *Reg.* v. *Keyn*, L. R. 2 Ex. D. at p. 160.

CUSTOM IN THE COMMON LAW.

BLACKSTONE in the introduction to his Commentaries describes the Common Law as consisting of general customs, particular customs, and the special rules administered by Courts of exceptional jurisdiction, such as the Ecclesiastical and Admiralty Courts[1]. As the last mentioned rules are not, properly speaking, part of the English Common Law, they may be left out of account, and it may be said that Blackstone treated the Common Law as consisting of the general customs of the realm, and special customs prevailing over certain local areas or among certain more or less definite classes of citizens. The principles of the Common Law are undoubtedly largely due to these two sources, general and particular customs—to what extent and in what way it will be the object of this paper to point out. But before proceeding with that inquiry it is desirable to distinguish a third way in which custom operates in English Law as a creator of rights and obligations. There is a large class of cases where custom forms an element for consideration, not as a part of our substantive law but as settling the duties to which parties to a contract have voluntarily bound themselves.

It is obvious that there is in principle a great difference between customs which create rights and obligations through the medium of a contract on the one hand, and customs which create rights and obligations, as it were directly, and independently of any contract, on the other. Whether or not a custom should be treated as an implied term in a contract is, properly speaking, a question of fact in each case, part of the larger question, What was the contract between the parties? Except that the decisions have established certain presumptions in favour of customs of the trade, the effect of custom on contract is not a subject for general rules of law, but for decision, according to the particular facts of each case. On the other hand the rules which regulate the effect of custom in creating rights and liabilities between people independently of any contractual relationship, are entirely matter of law and not of fact. It follows that the considerations which apply to the solution of the question, When should a custom be

[1] See Blackstone, Com., Introd. s. 3, p. 67.

deemed part of the Common Law? are very different from those that are applicable when the question is whether a given custom is to be held to be part of a particular contract. Though this distinction is so clear in principle, it has not unfrequently been lost sight of in practice[1]. And no little confusion has thereby arisen, especially in the law affecting agricultural customs, or 'customs of the country,' as they were called. In the older cases it is not clear whether the Courts regarded these customs as implied terms in the lease, or as having the force of law quite independently of the lease. In many of them tests were applied to 'customs of the country' which are, properly speaking, applicable only to 'particular customs,' and are quite unnecessary when custom is treated as operating through a lease or other contract. The latter view of agricultural customs is the one that has ultimately prevailed[2].

Particular customs are analogous to the customs of the realm, but are limited in their application to a certain local area, or to a defined class of people. They form a kind of local common law. And at one time they appear to have been treated as questions of law as distinguished from questions of fact. Thus it is laid down in a case in the Year Book 13 Ed. IV. 2, that where a custom is pleaded in the vill, court, or country where the custom is used, it shall be tried by the justices and the court and not by the country[3]. That is to say, in a local court the local custom is part of the local law, and is matter for the judge, and not for the jury, just as in the King's Courts the customs of the realm are to be decided on by the judge as matter of law. Even in the King's Courts judicial notice was taken of certain notorious local customs such as gavelkind, borough-English, and the custom of London with regard to the distribution of the assets of an intestate[4]. When questions arose in the King's Courts as to the customs of London, it was usual for the Court to decide not on evidence, but on the custom as stated by a certificate of the judges of the City Courts. Thus in *Readshaus* v. *Duck*[5], where a question arose as to the custom of London, the Master was directed to state a case to ascertain from the Lord Mayor, Aldermen, and Recorder of London what the custom of London was in reference to the matter in dispute. The Recorder certified that there was no custom of London applicable to the case, and the judges then fell back on the ordinary Common Law. It was, however, only in doubtful cases that application was thus

[1] See the judgement of Park J. in *Zwinger* v. *Samuda*, 7 Taunt 264. It was there contended in answer to a claim that dock warrants were negotiable by custom, that the custom was too recent. Park J. held that the warrants were negotiable, and said that the custom was not so recent as in *Noble* v. *Kennoway*, 2 Dougl. 510, which was a case of contract.

[2] See *Wigglesworth* v. *Dallison*, 1 Sm. L. C. 569, and notes.

[3] See also 11 Ed. IV. 3. [4] See *Cason's* case, 7 Vin. 196, Hetl. 158. [5] 7 Vin. 216.

made to the Recorder as the custodian of the ancient City customs. Most of the customs which differentiated the rights of the citizens of London from those of other subjects of the Crown, came so frequently under the notice of the judges, and from the earliest times became so well known, that judicial notice was taken of them without either evidence or certificate. This shows how strictly analogous to the general custom of the realm were the particular customs which prevailed in particular localities.

We are so accustomed to parliamentary legislation as the chief source of new law, that it is a little difficult to realize the fact that law-making by statute is of comparatively modern origin. Yet such is the undoubted fact. Although a considerable part of the Common Law received from time to time recognition or amendment by means of statutes, yet the great mass of the laws administered by English judges, until comparatively recent times, owed their origin to other sources than direct conscious law-making. It has been pointed out by Sir H. Maine that among the progressive races the movement of law is from status to contract. It is equally true, perhaps only another side of the same truth, that the progress of legislation is from custom to statute—from unconscious to conscious law-making.

Our earliest recorded statutes amounted to little more than a solemn recognition of pre-existing rights of the subject which, though forming part of the Common Law, were frequently set at naught, either by the sovereign, or some of the more powerful nobles. Such statutes as Magna Charta were never looked upon by their authors as the origin of the rights thereby secured to the subject. Nor was the solemn admission of the Common Law rights of the subject by the sovereign treated as being by its own force a final settlement of the law. It was thought necessary to secure a renewal of such admissions from successive sovereigns. It was only by degrees that the finality of statute law and the legislative supremacy of Parliament were established as the fundamental law of the constitution. And even after the legislative functions of Parliament became permanently assured, it was long before legislation, in the sense of the making of new laws, was considered to be the primary object of the meeting of Parliament. The main function of Parliament in the earlier periods of its history was to grant supplies, and the Commons made it their business to secure the maintenance of the existing law and the redress of grievances by exacting from the necessities of the sovereign a solemn recognition of rights which they claimed to be theirs by custom.

The consequence of this was that the source of almost all the rules that were required for the legal definition of the mutual rights and

responsibilities of the various members of an advancing community, had to be sought elsewhere than in parliamentary legislation. The source on which the judges mainly relied was custom—whether as custom of the realm, or as local custom. A glance at the title 'Custom' in any of the older digests, such as Bacon's or Viner's Abridgement, is sufficient to show how great variety of rights of a kind that would in modern law be found to be based on statute or contract were in the old Common Law based on local customs [1]. It is with regard to these local or 'particular' customs that Coke says that Custom 'is one of the main triangles of the laws of England, those laws being divided into Common Law, Statute Law, and Custom [2].'

It was in reference to 'particular customs,' that the well-known tests of the validity of custom were laid down. It was said that the validity of a custom depended on its being (1) certain and unambiguous, (2) reasonable, (3) on its having existed from time immemorial. And it was further added that it should not 'exalt itself' upon the prerogative of the King; *Nullum tempus occurrit Regi* [3]. I have already pointed out that not a little confusion has arisen from applying these tests to customs as imported into contract. They are equally inapplicable to general customs of the realm. The first condition, certainty, is indeed applicable to all cases where custom is suggested as the basis of rights. But it is not, properly speaking, a condition at all. It merely amounts to the obvious proposition that a custom is a different thing from a variable practice. An uncertain custom is no custom at all. With regard to the second condition, it certainly has no applicability to general customs, if it is correct to say that the custom of the realm is the Common Law. This condition has frequently been applied to cases where custom operates through a contract. But it is submitted that it is properly applicable, not as a test, but merely as an element for consideration in reference to the question, Did the parties contract on the basis of the custom? If the custom is actually known to both parties, or so notorious that they must be taken to have known it, its unreasonableness makes the presumption that they would have specifically excluded the custom, if they did not mean to be bound by it, much stronger than it would be if the custom were reasonable. On the other hand, where the custom is not actually known or notorious,

[1] Many of the questions discussed in reference to local customs resemble questions that arise in modern cases in reference to contract. Thus one of the elements entering into the discussion of the reasonableness of a custom was 'consideration,' *quid pro quo*. See 8 Ed. IV. 19.

[2] Co. Litt. 110 b.

[3] Co. Litt. 110 b; Blackstone, Com. i. 76; 7 Vin. Abr. 187.

it may well be implied that the parties contracted to be bound by reasonable but not by unreasonable customs. But whatever may be the correct view as to the second condition, the third undoubtedly applies only to particular 'customs.' That existence from time immemorial is not necessary to give to general customs the force of law was decided as early as the second year of Henry IV. The case seems to be one of the earliest reported cases where the cause of action was negligence. The plaintiff and defendant were adjoining householders, and the plaintiff claimed damages because the defendant so negligently looked after his own house that it caught fire and set fire to the plaintiff's house also. The claim was based on the law and custom of the realm, and it was objected to on the ground that being founded on custom it did not allege that the custom had existed from time immemorial. But the court overruled the objection; *car comen ley de cest realme est comen custome de realme*[1]. The whole of our modern commercial law was founded on general customs. Such customs were very frequently pleaded as immemorial, but as I shall presently show, the pleading was only *e majori cautela*, and if the pleader was prepared to rely on a general custom of the realm the custom need not have been pleaded at all[2]. It is therefore clear that this condition, existence from time immemorial, is not applicable to customs of the realm, since that part of the Common Law which deals with the affairs of commerce, the law merchant, is founded on custom and yet is of comparatively modern origin. It is obvious too that it is quite inapplicable to the consideration of custom as an implied term in a contract. Both the second and third conditions are properly applicable only to particular or local customs. They were used by courts of law as a means of checking the indefinite growth of local customs, which, if unchecked, would have established a multitude of distinct local laws throughout the country. As it was, local customs were in the main confined to matters of merely local interest.

Having pointed out the distinction between general customs, particular customs, and customs operating through contract, I now proceed to show what reasons exist for thinking that Blackstone was right in identifying the Common Law with the general customs of England. For asserting that custom was the source of the Common Law, Blackstone was attacked by Austin with a severity, not to say virulence, that would not have been justified had the theory been entirely without foundation. But, so far from being without foundation, the proposition which excited the ire of the great analytical jurist, affords the only rational explanation of the

[1] See 2 H. IV. 18.

[2] *Bromwich* v. *Lloyd*, 2 Lutw. 667.

genesis and early development of the Common Law, and is abundantly supported by the evidence of the old writs and the records of the Year Books.

It is of course true, as Austin maintains, that customary laws receive their binding force from the fact that they have been, or will be, adopted as the *ratio decidendi* of some Court of Justice in cases to which they have been already applied by custom. But it is not true that, in adopting these rules, the judges were legislating in the sense in which Parliament is said to legislate, when it passes measures demanded by public opinion. In adopting the general customs of the country, the judges can hardly be said to have legislated at all, inasmuch as the principle on which they acted was that, quite apart from their judicial adoption, the customs of the realm actually were the law of the realm. And it is difficult to see why a judge bound to decide in accordance with a general custom should be said to be legislating when he so decides, while he is not said to be legislating when he decides in accordance with an Act of Parliament. It is true in the one case that those who make the custom (the community) make the law, just as it is true in the other case that those who pass the Act (Parliament) make the law. On the whole, Blackstone's view, though perhaps too broadly stated, is nearer the truth, both historically and from the point of view of theoretical jurisprudence, than that of his vigorous critic. The theory is too broadly stated by Blackstone and the older authorities from whom he derived it, because, though the main source of the Common Law was the custom of the realm, yet its advancing stream was replenished from time to time from other sources, such as judicial notions of convenience, and principles derived from the Roman law. Still the theory of judges and text-writers, from the earliest times till the time of Blackstone, was that the Common Law of England was none other than the common custom of England. And this theory, which was a commonplace of English jurisprudence when Blackstone wrote his commentaries, is the only one that affords a rational explanation of the growth of the Common Law, and of the numerous and significant references to the custom of the realm in the old writs and in the cases reported in the Year Books.

An examination of the writs in Fitzherbert's Natura Brevium shows that the greater number of the old writs contain references either to a statute, a charter, or to the 'law and custom of England,' as the foundation of the right sought to be enforced. The three original writs of the Common Law were the writ of right to land, the writ of debt and detinue, and the writ of trespass. These three contain no reference to the source of the obligations they were used to enforce; but all the writs that provide remedies for less

obvious wrongs refer to custom, charter, or statute as the foundation of the remedy. Thus the writ of partition [1], the writ *de cautione admittenda* [2], the writs arising out of distress and replevin [3], the writ against innkeepers [4], the writ *de parco fracto* [5] and many others [6] contain references either to 'the law and custom of England,' or to 'the custom of England' simply. By the oath administered to the judges on their appointment, they were sworn to administer justice according to the law and custom of England [7]. The writ of *oyer and terminer* directed to judges of Assize, commanded them to decide the cases brought before them according to the law and custom of England [8]. All the ancient forms imply the identity of the Common Law of England with the common custom of England.

But the doctrine is not merely implied in the old forms of procedure. It is clearly laid down by the judges in several of the older cases, that the Common Law of England is the common custom of England [9]. The action against common carriers was of more modern origin than the action against innkeepers, but like the latter it was originally founded on the custom of the realm [10]. The judgement of Patteson J. in *Pozzi* v. *Shipton* [10] contains an interesting account of the way in which the reference to the custom of the realm dropped out of claims against common carriers. It may well be that the same process took place in a great many other forms of action, though we cannot now trace it. A similar process undoubtedly did take place, as I shall presently show, in certain actions of a comparatively modern origin, founded on the custom of merchants. 'The practice,' says Patteson J., 'appears to have been in former times to set out the custom of the realm; but it was afterwards very properly held unnecessary so to do because the custom of the realm is the law, and the Court will take notice of it, and a distinction has for many years prevailed between general and special customs in this respect. Afterwards the practice appears to have been to state the defendants to be common carriers for hire *totidem verbis* [11].' The doctrine that the custom of the realm is the Common Law has frequently received judicial recognition in modern cases [12]. It is therefore no longer open to doubt as a proposition of law, and, though it does not necessarily follow that the doctrine correctly represents the origin of the Common Law,

[1] Nat. Brev. i. 61. [2] Ib. 63. [3] Ib. 66, 69, 87, 89, 90. [4] Ib. 94.
[5] Ib. 101. [6] See ib. 103, 110, 111, 115, 132. [7] 12 Co. Rep. 64.
[8] Nat. Brev. 110.
[9] 19 Ed. II. 624; 30 Ed. III. 25, 26; 2 H. IV. 18; 8 Ed. IV. 19; 11 Ed. IV. 3; 2 H. VI. 21, and see the learned introduction to 32 & 33 Ed. I. p. xxxiii.
[10] *Pozzi* v. *Shipton*, 8 A. & E. 963; *Tattan* v. *G. W. R.*, 2 E. & E. 844; *Nugent* v. *Smith*, 1 C. P. D. 19, 423. [11] See *Pozzi* v. *Shipton*, 8 A. & E. at p. 974.
[12] See *Veley* v. *Burden*, 12 A. & E. per Tindal C.J. at p. 302; *Nunn* v. *Varty*, 3 Curt. per Sir Jenner Fust at p. 363; *Fitch* v. *Rawling*, 2 H. Bl. 394, 3 R. R. 425; *Blundell* v. *Caterall*, 5 B. & A. per Best C.J. at p. 279.

the fact that it can be traced in the reports from the earliest times affords a very strong presumption that the Common Law originated in the judicial adoption of the common customs of the realm.

It will have been noticed that the writs that contain a reference to the custom of the realm are not those which deal with the most obvious wrongs, such as assaults or trespasses. There are some acts that are so obviously wrong that it is not to be expected that it would be considered necessary, even in the most primitive condition of society, to assign a reason for granting a remedy. It is impossible to imagine any community which has reached that stage of national development which is implied in the provision of courts of law for the settlement of private quarrels, finding it necessary to ground its interference in cases of the most obvious wrongs, such as unprovoked assault, or deprivation of property, on any reason beyond the mere description of the act. There was a time in the history of all Teutonic communities when the state did not interfere in private quarrels. This was not because intelligence was of such a primitive character as not to have developed the notion that theft and unprovoked assaults were wrongs that ought to be remedied; it was because the community had not yet reached the conception of state-provided remedies, the remedy being left to the injured individual. When the state first provided remedies for private grievances by the issue of writs, it would have been pedantic and absurd in the last degree to suggest that the right of redress for these obvious wrongs was based on the custom of the realm. Accordingly we find no reference to custom or any other ground of remedy in the three original writs of the English Common Law—the writ of right to land, the writ of trespass, and the writ of debt or detinue—which may be said, roughly speaking, to have afforded remedies for assaults and thefts of land or goods. But in other less simple cases, where the remedy or liability was not so clearly deducible from the most elementary notions of right, the writ usually contained a reference either to charter, statute, or custom as the source of the obligation sought to be enforced. And where the courts had neither charter, nor statute to guide them, they naturally fell back upon custom. There is no conviction more deeply rooted in the mind of primitive people than the belief that they have a right to continue doing what they have been allowed to do as long as they can remember. It would have been strange indeed if popular courts, such as our earliest courts were, had not given effect to this conviction, by recognizing as right all acts done in accordance with long-remembered customs, unless such customs could be proved to have had a wrongful origin. Once it became

established that custom, or long use, was the test whereby the courts determined the rightfulness of claims on which they were called upon to decide, it is easy to see that, when any novel form of liability was alleged, it would be alleged as arising out of custom, as was done in the case of negligence already cited from the Year Book 2 H. IV. 18. And it may well be that new forms of liability were introduced into the Common Law from sources other than actual immemorial usage, by means of the fiction that they arose from 'the common custom of the realm.'

It is no easy matter to trace with any degree of certainty the origin and growth of a system of jurisprudence that grew up at a time when it was not customary to record the proceedings of courts of justice. The germs of most of our early Common Law principles of liability were developed in the local courts prior to the Norman Conquest. Unfortunately these local courts kept no written records of their proceedings. 'Legal archives in the proper sense of the words did not exist among the Anglo-Saxons. On rare occasions the verdicts of the hundred or the shire might be written in the blank leaves of the missal belonging to some neighbouring minister; but though this mode of preserving the history of the transactions might be adopted the document had no legal effect. It could not be pleaded, and the strict and proper mode of legal proof was by appealing to living testimony. If evidence was required of judicial transactions the proof was given by the hundred or shire in its corporate capacity, the suitors bearing witness to the judgements which they or their predecessors had pronounced [1].' This passage shows the importance attached in legal proceedings to memory and living testimony. The difficulty of proving anything that existed beyond the time to which the memory of the suitors extended may have given rise to the condition attached to customs, that they should have existed from time whereof the memory of man runneth not to the contrary [2]. For long after the Conquest the local courts continued to be the only courts readily accessible to the greater number of the people of England. And at the time when itinerant justices were first instituted [3] there must have been a considerable body of customs which had become firmly established as local law by frequent recognition in the local courts. The constitution of these courts made it inevitable

[1] Palgrave, i. 143. Cited in Stephen's History of Criminal Law, vol. i. p. 68.

[2] The time of legal memory must originally have had reference to the memory of the court suitors. It was subsequently fixed as from the first year of Richard I, on the analogy of the statutory limitation of the writ of right. See Co. Litt. 113 a.

[3] Itinerant justices date their origin, as a regular and definitely recognized part of our judicial system, from the reign of Henry II. There were, however, occasional circuits at a much earlier period, certainly in the reign of Henry I, probably also under the later Saxon Kings. Hallam, Middle Ages, p. 544; Stubbs, i. 391, 392.

that they should rely on custom for guidance in regard to the claims brought before them. If the judges had been men of learning they would doubtless have fallen back on the principles of Roman law as the guiding principles of their decisions. But these ancient local courts were entirely different, in constitution and procedure, from courts of law as we know them in modern times. They were popular assemblies, councils of the hundred or county, and bore very slight resemblance to modern courts, with their well-recognized limitations and definitions of the respective functions of judge, jury, witnesses, and counsel. If we imagine a county council, in addition to its administrative business, taking on itself the decision both of criminal and civil suits, the members acting, not only as judge and jury, but also as witnesses, and occasionally as advocates, we shall have a rough picture of an English county court in the Anglo-Saxon, Norman, and early Plantagenet periods. 'The courts of those days,' says Sir James Stephen, 'supplied the means by which every kind of business was transacted, and had probably a greater resemblance to a public meeting than to a court of justice in the modern sense of the term. This was true of all courts whatever, but especially of the county court, which was, in the earliest times of our history, and continued to be down to the reign of Edward I, if not later, "the folkmoot or general assembly of the people" in which were transacted the more important branches of public business, judicial, financial, and military[1].' The president of the Court was sometimes a bishop, sometimes an ealdorman, or a sheriff; but the nobles and most of the bishops were men who more frequently excelled in feats of arms than in learning or culture. Moreover the decision lay, not with the president, but with the general body of suitors. After exhausting the elementary notions of morality, such a court would have nothing to fall back upon but the customs with which the suitors were all familiar. There is no opinion that grows up more naturally or obtains a stronger hold on the human mind than the belief that long use establishes right, and a popular court would naturally be influenced by this belief and would inevitably turn to custom as the arbiter of civil disputes. In the Courts of the Church, the judges, ecclesiastics, learned in the language and literature of Rome, naturally turned to Roman law as the source of their jurisprudence. Roman law was a sealed book to the rude suitors of the county and hundred courts, but in existing customs they found ready to their hands the skeleton of a body of jurisprudence,

[1] Stephen, History of the Criminal Law, vol. i. p. 77. See also an interesting account of a County Court trial in the reign of Canute, cited in Hallam's Middle Ages, vol iv. c. 8, pt. 1; Kemble, Cod. Dipl. DCCLV, Essays in Anglo-Saxon Law, Appx. no. 28.

better suited to the character and conditions of life of the English people.

It is on the foundation of customs that had their origin before Courts of Law came into existence that the English Common Law has been built. As the system grew, though it assimilated principles drawn from other sources, custom continued to have a large share in its development. As the early Common Law grew mainly out of the customs affecting land tenure, so in more recent times commercial law, or the law merchant, as it was called, grew out of the customs of merchants. Thus, though it may not be strictly accurate to say that custom is the sole source of the Common Law, it is sufficiently near accuracy to make Blackstone's account of the Common Law substantially true.

The researches of Sir H. Maine have supplied convincing evidence that in the natural history of civilized communities custom, as the creator of social rights and duties, precedes law. Very few people nowadays pin their faith to the theory of a social compact. In the form which this theory took in the works of Hobbes, Locke, and Rousseau, it is now known to be fictitious history. Yet social compact in some sense there must have been, or social progress would have been impossible. Every organized community, however small the community or limited the organization, implies the consent of a number of people to live in relation to one another on certain terms. The terms are not consciously assented to by the members, nor are they in any sense considered to be due to agreement. But it is none the less true that both the terms and the consent are actual facts. Without either of these fundamental conditions of social life the most primitive form of society is impossible. It is custom that writes out slowly, from generation to generation, the terms of the social compact. When the period of law is reached, the terms of the social compact have been developed in some detail, and are recorded in the long-remembered usages of the community. In its earlier stages law interferes very little with the domain of custom. Long after the birth of law custom continues to be the chief regulator of private rights. At first law is mainly criminal, concerning itself with little beyond the preservation of public order. In Judge Holmes' profound and suggestive book on the Common Law it is said that the germ of the English Common Law lies in the family feud. This, of course, cannot mean that the family feud suggested the principles of the Common Law. It means, as I understand it, that law was introduced as a means of righting wrongs that were previously left to be dealt with by private vengeance. The development of English law may be roughly represented as proceeding by the following three stages.

(1) *A* wrongs *B*; *B* kills *A*; *A*'s son kills *B*; *B*'s son kills *A*'s son; and so on *ad infinitum*. This is the period antecedent to law.

(2) *A* wrongs *B*; *B* kills or maims *A*. In the interests of public order law steps in, and gives *A* or *A*'s family a money compensation instead of leaving them to carry on the feud. This is the earliest stage of law in Teutonic communities (in England the era of the Saxon codes). It will be noticed that in this stage law provides no remedy for the original wrong, but only interferes with the object preserving the public peace by putting an end to the family feud.

(3) *A* wrongs *B*. The law now not only prevents *B* from killing *A*, but provides him with a remedy for the wrong he has suffered. When it arrives at this stage law has reached its final stage of development, having become a system of rules prescribing the mutual rights and duties of the various members of the community. In the final stage, law takes the place occupied by custom in the two prior stages. It defines the rights and liabilities of the different members of the community in their relations with one another. In the two earlier stages, these are regulated by custom. It is custom that provides the adhesive principles that keep society together in its earlier stages of development. When courts of law come upon the scene, they build upon the foundation already laid for them by custom.

A further stage in the development of English Law was reached when the institution of itinerant justices was established. 'We have owed to it,' says Hallam, 'the uniformity of our Common Law which would otherwise have been split, like that of France, into a multitude of local customs[1].' The itinerant justices, when they first went their circuits, must have found a large number of legal customs which had been recognized as binding, in every Court, and in every county in the kingdom, and also a number of customs peculiar to different localities. The former, the common customs of England, became the basis of the Common Law; the latter continued to be a kind of local law, but they were required to be proved, and their growth was limited by the conditions already referred to.

To sum up. Though it would be unreasonable to dogmatize on a question on which the paucity of the evidence gives so little ground for scientific accuracy, the very nature of the Common Law, and such evidence as exists in its early forms of procedure, and in the records of the Year Books, render it more than probable that the Common Law originated in the way indicated, by the differentiation of the legal customs which were common to the whole realm from the peculiar customs of each

[1] Hallam, Middle Ages, ch. 8. pt. ii p. 544.

county or hundred. The development of custom into law took place by three stages—custom preceding law, custom as local law, and custom as Common Law; and the links between the second and third stages were forged by the itinerant Courts.

In dealing with the influence of custom on the later developments of the Common Law we are on firmer ground. As the Common Law broadened to meet the needs of an advancing people, it drew fresh principles from various sources. Of these, custom was, not only the most prolific, but the only one recognized by strict legal theory. The judges never admitted that the requirements of public convenience could be allowed to alter or add to the principles of the Common Law, though they frequently acted on a different principle, and permitted their sense of public convenience to influence their decisions. But it was generally admitted that the Common Law, which in theory was the custom of England, was open to receive fresh principles from general customs; and the greater part of what is called the law merchant, the Common Law of commerce, grew out of the gradual adoption by the courts of the customs of merchants. It is to the custom of merchants that we owe the law as to bills of exchange, promissory notes, and other negotiable instruments, as well as much of the law affecting bills of lading, charter-parties, general average, marine insurance and other commercial documents and transactions. A large part of Commercial Law is concerned only with the making and interpretation of contracts. This part of the law is mainly developed by deducing logical inferences from the theoretical conceptions of jurisprudence, and applying them with such modifications as practical exigences may render necessary to the complicated facts of commerce. Though not created by mercantile customs, this branch of Commercial Law is in its development largely influenced thereby. A very large part, however, of Commercial Law is entirely outside the law of contract, concerning itself with the rights and duties of people who have no contractual relations with one another. It is in this part of Commercial Law that the influence of custom, as a creative principle, has been mainly felt, especially in the law affecting negotiable instruments, bills of lading, and commercial liens. It is an interesting task to trace the growth of a branch of the law, that is of comparatively modern origin and has left traces, more or less distinct, of its mode of development, in the pages of our Law Reports. Such a branch of our law is the law affecting bills of exchange and other negotiable instruments. Its origin in mercantile custom can be distinctly traced, and it is interesting to note that commercial customs, out of which the law of negotiable instruments grew, seem to have travelled along exactly the

same line of development, and as the earlier territorial customs which formed the foundation of the Common Law.

It is well known that for some considerable time before we meet with them in the reports, bills of exchange were used by English merchants for the purposes of foreign trade[1]; they were treated by custom as binding long before they obtained the force of law through the recognition of Courts of Justice. In the earliest reported case in reference to a bill of exchange , the action was not founded on the document itself as a substantive cause of action, but was in the form of assumpsit (the old general form of actions of contract). As the action was by the drawer against the acceptor, there was privity of contract between the parties, and as the bill, like any other document, would be evidence of the contract, no new legal principle was involved. The bill was stated in the declaration to have been drawn *secundum usum mercatorum*, but there does not seem to have been any evidence of what the *usus mercatorum* was, nor would any be necessary, as the action was in assumpsit between parties between whom there was privity of contract, and the obligation was complete without proof of any custom[3].

In the next reported case, *Oaste* v. *Taylor*[4], which was decided ten years later, the action was by the payee against the acceptor. The allegation of a general custom does not seem to have occurred to the pleader, and the declaration was based on a special custom of London which was thus stated. 'Whereas by the custom of London between merchants trafficking between London and parts beyond the seas, if any merchant commorant in London and trafficking beyond the seas, direct his bill of exchange *bona fide* and without covin to another merchant commorant beyond the seas and trafficking betwixt London and the parts beyond seas; upon such a merchant's accepting a bill and subscribing it according to the use of merchants, it hath the force of a promise to compel him to pay it at the date mentioned in the bill.' The plaintiff succeeded in getting judgment at the trial, but whether evidence was adduced to prove the alleged custom, or whether the judge took judicial notice of it, does not appear from the report. As however the custom was laid

[1] See the judgment of Cockburn C.J. in *Goodwin* v. *Robarts*, L. R. 10 Exch. 237.

[2] *Martin* v. *Boure*, Cro. Jac. 6 (decided in the first year of James I).

[3] A question much agitated in the early days of bills of exchange was whether an action of assumpsit would lie on a bill of exchange (see per Holt C J., 5 Mod. 13, and 1 Salk. 125, 12 Mod 37, and *Hodges* v. *Steward*, 1 Salk. 125). In all these cases it was held that assumpsit would not lie. Yet both in *Martin* v. *Boure* (Cro. Jac. 6) and *Oaste* v. *Taylor* (Cro. Jac. 306) the action was in assumpsit. The true rule seems to be the one stated in a note to *Hodges* v. *Steward*: 'The conclusion resulting from the "several cases on the subject" seems to be this: that where a privity exists between the parties, there an action of debt or *indebitatus assumpsit* may be maintained; but where it does not exist neither of these actions will lie.'

[4] Cro. Jac. 306.

as a local custom it must have been supported by evidence, proof being always required of local customs, except such notorious customs as gavelkind, borough-English, &c. This case reveals to us the law of bills of exchange in its infancy. The plaintiff's right is based on a local custom set out in the declaration and (presumably) proved at the trial, and extending only to foreign bills of exchange. Bills of exchange were invented originally to meet the necessities of foreign trade. And for a long time, at any rate in England, the use of them seems to have been confined to foreign traders. But their great convenience in time led to their being adopted in home-trading transactions. And finally they came to be used for all purposes, whether trading or not. The growth of the law followed that of the custom. At first the Courts only gave effect to foreign bills between traders. It was only by degrees that legal recognition was extended first to inland bills between traders, and at length to all bills, whether drawn and accepted by traders for purposes of trade, or by private persons for purposes unconnected with trade. This expansion of the law was recognized by Chief Justice Treby in his judgment in *Bromwich* v. *Lloyd*[1]. The report states that in overruling several objections to the declaration, the Chief Justice said that bills of exchange at first were extended only to merchant strangers trading with English merchants, and afterwards to inland bills between merchants trading one with another in England, and after that to all traders and dealers, and of late to all persons trading or not; and that there was no occasion to allege any custom. This extended recognition of bills of exchange was only brought about slowly, by those tentative hesitating steps that are so characteristic of English law reform, whether legislative or judicial. At first inland bills were based on local custom. It was alleged that the city where the plaintiff dwelled and carried on business was an ancient city, that the city where the defendant dwelled and carried on business was an ancient city, and the custom was alleged as applying only to transactions between merchants in the two ancient cities[2]. Unfortunately the reports do not give us any information on the important question whether the custom was required to be proved, or whether the Court took judicial notice of it. But in the earlier cases at least, there must have been some evidence of the custom. It is probable that after a time the pleaders ceased to consider it worth their while to traverse the existence of the custom[3]. Once the commercial

[1] 2 Lutw. 667.

[2] *Claxton* v. *Swift*, 1 Lutw. 362; 3 Mod. 86, and see per Holt C.J., 6 Mod. 29.

[3] See *Hodges* v. *Steward*, 1 Salk. 125. In *Buller* v. *Cripps*, 6 Mod. 29, Holt C.J. is reported as saying, 'I remember when actions on inland bills of exchange did first begin, and there they laid a particular custom between London and Bristol; and it

custom was recognized as a general, and not a local custom, in mercantile affairs, no evidence of it was required, as the Court took judicial notice of general customs, just as it did of the rest of the Common Law. Even as early as 3 & 4 James II it was held in *Carter* v. *Downich* [1] that it was sufficient to allege by plea that a bill had been indorsed according to the custom of merchants without setting out the custom, because the customs of merchants were part of the Common Law, and the Courts would take judicial notice of them. A further stage in the development of the law was reached in the first year of William and Mary, when it was for the first time held, that an acceptor, who was not a merchant, was liable on a bill which was not made for purposes of trade. It is curiously illustrative of the timidity and hesitation of our earlier judges in seizing and giving effect to a new general principle, that in extending the legal recognition of bills, so as to include bills between people who were not merchants, instead of at once boldly acknowledging that they were extending the law to cover the extended use of bills, they enlarged the application of the law by a legal fiction, allowing the plaintiff to plead that defendant was a merchant and refusing to allow the defendant to deny that he was so [2]. A further step was taken in *Williams* v. *Williams* [3], where a declaration stating the custom as *inter mercatores et alias personas commercium exercentes infra hoc regnum angliae residentes* was held to be good. The final development, when bills passed entirely out of the realm of custom into that of pure law, was reached when it was held to be unnecessary to allege any custom, or even to say that the bill was accepted, drawn, or indorsed, as the case might be, according to the custom of merchants [4]. Such were the steps whereby mercantile usages with reference to bills of exchange forced their way into the Common Law. It is worthy of note, that, in the process, mercantile custom passed through the three stages that the older customs of the realm passed through in the origin of the Common Law. First they were customs followed by the general consensus of merchants, next they were local customs which were enforced when proved, and lastly they became general customs of which the Courts took judicial notice.

was an action against the acceptor; the defendant's counsel would put them to prove the custom, at which Hale, Chief Justice, who tried it, laughed, and said they had a hopeful case of it. And in my Lord North's time it was said that the custom in that case was part of the Common Law of England; and these actions since became frequent as the trade of the nation did increase; and all the difference between foreign bills and inland bills is that foreign bills must be protested before a public notary before the drawer can be charged, but inland bills need no protest.'

[1] 1 Shower 124, 3 Mod. 227.

[2] *Sarsfield* v. *Witherley*, Carthew. 82 (1 W. & M.).

[3] Carthew. 269 (5 W. & M.).

[4] *Bromwich* v. *Lloyd*, 2 Lutw. 667 (8 W. 3); *Erskine* v. *Murray*, 2 Ld. Raym. 1542 (2 Geo. II).

Promissory notes were undoubtedly within the custom of merchants, to the same extent as bills of exchange, and if it had not been for the obstinacy of Chief Justice Holt, who set his face against receiving laws from Lombard Street, as he put it [1], they would have been held to be within the rules as to bills of exchange. The only permanent result of Holt's opposition was that Parliament was constrained to do what the judges, through his influence, declined to do [2]. Holt was a great lawyer, but his petulant opposition to actions on promissory notes is not to be reckoned among the acts that constitute his title to a great reputation. His view was contrary to that of the whole of Westminster Hall, and there can be no doubt that promissory notes had exactly the same claim to legal recognition as bills of exchange, namely, the general custom of merchants throughout England.

Many of the rules that subsequently became fundamental principles of the law of bills of exchange, were at first rejected by the Courts, and only adopted as a tardy recognition of commercial customs, which grew out of experiments dictated by commercial convenience, and survived in accordance with the law of the survival of the fittest. When bills payable to bearer first came into use, the Courts refused to give legal effect to the bearer's rights [3]. 'Days of grace' were, as their name indicates, originally allowed as a matter of grace and not of right. However, when the custom of allowing the days of grace became general, the Courts held that the defendant could claim them as a matter of right on proof of the custom [4]. After the custom had been properly established by evidence, it passed beyond the sphere of evidence into that of law, and the allowance of days of grace became a fixed rule of law. The rule that a general custom once established by evidence becomes a legal rule of which the Courts will take judicial notice, was acted on by the House of Lords in *Brandao* v. *Barnett* [5], where Lord Campbell says, 'When a general usage has been judicially ascertained and established it becomes a part of the law merchant, which Courts of Justice are bound to know and recognize [6].'

It is clear from the above brief account of the early history of the law of bills of exchange, that 'the law merchant thus spoken of with reference to bills of exchange and other negotiable instruments, though forming part of the body of the lex mercatoria, is of comparatively recent origin. It is neither more nor less than the usages of merchants and traders in the different departments of

[1] See *Buller* v. *Cripps*, 6 Mod. 29.
[2] 3 & 4 Anne, c. 8.
[3] See *Hodges* v. *Steward*, 1 Salkeld 125, and notes thereto.
[4] In *Tassell* v. *Lewis*, 1 Ld. Raym. 743, evidence was given to prove the custom.
[5] 12 Cl. & F. 787.
[6] See at p. 805.

trade ratified by the decisions of the Courts of law[1].' The class of negotiable instruments has been extended from time to time to include various documents of which it was proved in evidence that they were treated as negotiable by the general custom of merchants and traders. This expansion of the law met with a temporary check from Lord Blackburn, who laid it down in *Crouch* v. *Crédit Foncier*[2] that usage could not have the effect of conferring the incident of negotiability on a document that was not negotiable by the ancient law merchant. In so far as it depends on this principle, *Crouch* v. *Crédit Foncier*[3] has been overruled by *Goodwin* v. *Robarts*[3]. It is now clear law that the judges are bound to give effect to the general customs of trade once they are sufficiently ascertained and proved[4]. 'While we quite agree that the greater or less time that a custom has existed may be material in determining how far it has generally prevailed, we cannot think that if a usage is once shown to be universal, it is the less entitled to prevail, because it may not have formed part of the law merchant as previously recognized and adopted by the Courts[5].'

The custom of the realm therefore, though its area of influence is greatly diminished, still remains, as it was in the early Common Law days, a fertile source of legal principle. Custom provided the materials for the foundation of the great structure of English Law; as the building progressed in size and magnificence, custom continued to be the largest purveyor of materials; and if further materials are required, custom is still available as the coadjutor of Parliamentary legislation. Though Blackstone in his famous introduction was but piecing together the shreds and patches of empirical jurisprudence that he found scattered in the writings of his predecessors, his identification of the Common Law with the common custom of England will stand the test of the most accurate historical and scientific criticism.

F. A. Greer.

[1] Per Cockburn C.J., *Goodwin* v. *Robarts*, L. R. 10 Ex. at p. 346.
[2] L. R. 8 Q. B. 374. [3] L. R. 10 Exch. 76, 337; 1 App. Ca. 476.
[4] See also *Rumball* v. *Metropolitan Bank*, L. R. 2 Q. B. D. 194; *Euston* v. *Joint Stock Bank*, 24 Ch. D. 95, 13 App. Ca. 333; *Colonial Bank* v. *Hepworth*, 57 L. T. 148; *Williams* v. *Colonial Bank*, 36 Ch. D. 659, 38 Ch. D. 388, 15 App. Ca. 268; *London & County Bank* v. *London & River Plate Bank*, 20 Q. B. D. 232, 21 Q. B. D. 535; *Fine Art Society* v. *Union Bank of London*, 17 Q. B. D. 705; *Picker* v. *London & County Bank*, 18 Q. B. D. 515.
[5] Per Cockburn C.J., *Goodwin* v. *Robarts*, L. R. 10 Exch. at p. 356.

THE DWIGHT METHOD OF LEGAL INSTRUCTION.

IT falls to the lot of few men like the late Professor Theodore W. Dwight to attain universal distinction as an advocate, jurist, legislator and publicist. His highest fame, however, will rest principally on his most noteworthy work—the great work for which he was ordained by his pre-eminent gifts—the preliminary education of more than six thousand students for a career of usefulness in the profession and practice of law. It is for the great ability and conscientiousness which he brought to the discharge of his many responsible duties, and the widespread importance of the results of his life's work, that his name will always arrest attention and command respect. When he resigned his position as Warden of Columbia College Law School and as Professor of the Law of Contracts, Maritime and Admiralty Law, in February, 1891, it was thought that such action marked the close of an active professional life, in which lasting honour and distinction had been attained; and when the announcement of his death at Clinton, New York, in June last, came, it was met with a feeling of the most profound regret and sadness, not only among those who were fortunate enough to meet him in his capacity as an instructor, but among those who knew and met him as a member of the highest appellate court in the State of New York, and as a broad-minded, thoroughly informed publicist and patriotic citizen.

His retirement from active professorship in the Columbia College Law School was due to the course of action pursued by the ruling authorities of that institution in relation to the future conduct of the school. It was followed by the resignation of his associates in the faculty, Professors George Chase and Robert D. Petty, and Instructor Alfred G. Reeves. Soon after Professor Dwight's resignation, the New York Law School was organized with Professors Chase, Petty and Reeves as the leading members of the faculty, and with the first-named as the Dean. Professor Chase had already achieved a wide reputation, not only as a successful instructor in the Columbia College Law School, but as the author of several works, which are in daily use at the present time as standard text-books.

Professor Dwight was a man not only of charming personal

characteristics, but his professional learning and intellectual strength were manifest to every one. His extraordinary aptitude for teaching was so remarkable as to seem absolutely new to those who studied under him. His power to make every man a student was unfailing. As one writer has said about him,—'It is not law that he has taught so much as justice. If a student had not discovered how a rule or axiom had its foundation somewhere in the distinctions of absolute right and wrong, new light was thrown upon the subject, new illustrations were drawn from an exhaustless treasury of wisdom, and the ideal distinction was sketched until it seemed that the speaker was in touch with the very fountains of equity.'

Professor Dwight was born at Catskill, New York, July 18, 1822. He was a grandson of Timothy Dwight (seventh President of Yale University), and a cousin of the present honourable head of that famous institution. He graduated from Hamilton College at the age of eighteen with the highest honours, and afterwards came to New York City, where he pursued scientific studies for a few months, and then entered Yale Law School. After the completion of his course there he was, at the age of twenty-four, elected to the chair of Maynard professor of law, politics, &c. of Hamilton College, in which position he continued until 1858. During his incumbency at Hamilton College, he extended and developed its law school with such a high degree of success that when he was called to New York in 1858 to organize the law school of Columbia College, his reputation and fame as a legal instructor were firmly and widely established.

From the time he entered upon his new field of duties, the growth of the Columbia Law School in number of students and in its reputation was remarkable. The School was first located in the Historical Society's building, at the corner of Second Avenue and Eleventh Street. Afterwards, as the number of students increased from year to year, it was removed, first, to No. 37, Lafayette Place, a few years later to No. 8, Great Jones Street, and finally, within a few years later, to the grounds of Columbia College on East 49th Street, where it has since been located.

A history of Columbia College Law School would in reality constitute the history of a method of instruction and the educational work of a great teacher. From the very commencement of the School the primary object was to make its instruction theoretical and at the same time practical. Professor Dwight's guiding thought in his method of instruction was that, in order to prepare the students to give wise counsel, the principles and reasons of the law must be carefully instilled into their minds, and their capacity must be cultivated to discern and understand sound legal theory and

philosophy. Theory and practice, therefore, were never separated, but the one was always linked to the other. The students were taught by faithfully impressing upon their minds the reasons upon which legal rules and doctrines are based. They were so instructed as to view the law as a system of *principles*, and not as a mere aggregation of cases. At the very outset of his professional career, Professor Dwight realized that, as the student at the commencement of his studies was wholly unacquainted with technical legal words and phrases, and unversed in legal modes of thought or construction, whatever was taught him must be adapted to his comprehension, and presented in a form attractive to his mind.

His art of teaching was a perfect illustration of these principles, with the result that however abstruse the topic may have been, however perplexing its elements, the way to the student's mind was nevertheless most easily and effectually won by his simple and clear exposition, accompanied, as it ever was, with the additional charm of felicitous illustration.

Another principle of the method which he always pursued, and which made him so famous as a master, was that the rules and doctrines of the common law must be deduced from the decisions of the courts, and that the student, with little or no knowledge of law, without any conception of the rules of legal interpretation, and unfamiliar with technical words and phrases, should not be set at work primarily upon the reported cases, and instructed to deduce the principles of law therefrom for himself, but that the trained jurist, with years of study and experience, was better qualified than the student to deduce principles from cases, and to arrange them in their orderly philosophical relations, and to present them in proper systematic form. Therefore the method of study was to select a standard work upon some particular branch of the law, and to assign a suitable portion of this from day to day with which the student was required to thoroughly familiarize himself. Therein he found the principles of law deduced for him from the study of reports and statutes by one much better qualified than himself for this task. There he found these principles stated in an orderly arrangement and classification, so that he could properly appreciate their due significance. He studied legal rules in their proper order of relative succession, and in their proper relations to a comprehensive system, instead of viewing them separately and independently. By such a method the work of days or weeks by the author in the study of individual cases was aptly presented to the student in a brief and compact form, and in a mode of statement much more accurate and reliable than he could have worked out by his own labour. After this preliminary study, the student came before the

instructor for recitation, and being called upon individually to recite, he thus felt a sense of responsibility in exhibiting his knowledge of the subject, and his ability to state it accurately. The Professor then stated any circumstance of his experience and learning bearing on the subject before the class, and by clear illustration removed whatever difficulties may have been encountered by the student in his study of the book, or by the class as a whole. In this way the largest measure of assistance which could be given by the able text-writer and by the experienced professor was afforded to the student's need.

This method, moreover, did not exclude the reading of cases by the student, but encouraged and required it, in order to supplement and illustrate the diligent examination of the treatise. In this way the study of the reports fell into its proper place and became an aid and a help, instead of a source of perplexity and bewilderment.

The success and fruitfulness of this method of instruction are most abundantly exhibited in Professor Dwight's career. By this system, daily recitation from the text-book gives occasion for running comment of the instructor in which the reason for each legal principle is justified by logical necessity, or by some consideration of public policy, or by appeals to historical evidences of its origin in political conditions or exigences of a by-gone age. The history of the development of a rule of law, its modifications and exceptions are illustrated by the citation of and comment upon reported cases, or by the application of an appropriate maxim, and thus the attention of the student is directed to the constructive processes by which the body of our law has been built up, as the occasions of the people demanded. It will be observed, therefore, that the controlling principle of the method is the inculcation of the elementary rules of law applicable to its leading branches by presenting them in the simplest and clearest form, under a carefully studied and logical arrangement, fixing them in the mind by apt illustration, and by the drill of recitation and review.

The consequence is that the student bears away with him that which he never forgets; he has stamped in his memory an outline within which the results of all future labours naturally and readily flow; he has the basis upon which to rest the science of legal wisdom—the best equipment for the future development of his powers.

In support of the 'Dwight Method' of legal instruction the following extract, taken from an article by the Honourable Edward J. Phelps, in the Yale Law Journal for March, 1892, may be quoted:—

'The unhappy tendency of our time, not merely in schools, but to a considerable degree in the profession and in the courts, is to

encumber the law with much that is called learning, sought to be deduced from millions of heterogeneous, often irreconcilable, and sometimes incomprehensible cases, each of which, instead of being a decision upon the point involved, is a dissertation upon the general law of the subject. The terse, clear and logical judgements that are found in the earlier English and American reports, in which conclusions are deduced from principles, instead of from other conclusions, are not now much in fashion. It is easy to find single opinions in which more authorities are cited than were mentioned by Marshall in the whole thirty years of his unexampled judicial life, and briefs that contain more cases than Webster referred to in all the arguments he ever delivered. To plunge a student into this chaos, with his powers untried and imperfect, and his knowledge of principles incomplete, to grope his way through it as best he may, and to triangulate from case to case, supposing that he is getting forward, when he is only going astray, is not to educate him, but tends rather to make him proof against education. If the time comes when he can encounter it with the discrimination that is born only of a lucid conception of legal principles, he may be more safely trusted in a great law library without danger of being conducted by "learned reasons to absurd decrees."'

Mr. Phelps then speaks of the law school which he attended in his youth, and says:—

'What was taught there was only fundamental, but it was taught effectually. It sank into the student's mind and wrought itself into his ideas, and his modes of thought. The habit of reasoning from principles to conclusions gave him, if he was capable of attaining it, the large comprehension and strong logical power which are the characteristics of the sound lawyer, and the true weapons of the advocate. On the foundation thus formed, the superstructure can be rapidly built in after-life. To a mind so trained no logical propositions, however new, will be difficult; no complication of facts, however unusual, will embarrass the application of the rules of law, or put justice out of court.'

In the report of President Dwight of Yale University for the year 1891, the following will be found:—

'The method of instruction in the Law Department is believed to be the best that can be devised. It is mainly that of recitations. The recitations, however, are not conducted solely on the principle of questioning the student on the lesson which has been assigned him. Abundant opportunity is given for questioning on the part of the student himself, and freedom of communication between him and his instructors is allowed in all class-room exercises. The study which is recommended and pursued is a study of the great principles of the law in themselves, and in their application to cases. It is believed that this is the right and most healthful method and

order of study, rather than that which makes a beginning with individual cases, and then enters upon and follows out the principles which are involved in or connected with them.'

It has been claimed by opponents of the 'Dwight Method' that it necessarily involves a danger that the mind of a student may simply, like a sponge, absorb the contents of a book, and then have them squeezed out again without deriving much benefit from the process. In answer to this Professor Chase has said:—

'The "Dwight Method" effectually guards against this danger, for its aim is not simply that a student shall remember, but that he shall understand and assimilate. He studies the text-book carefully that he may learn and comprehend what he can by his own efforts, and also be enabled to understand the oral exposition in the class-room, and gain from it the largest measure of benefit. He is called upon to recite, not that he may repeat, parrot-like, the words of the book, but that he may show and develop his capacity to state in his own language the knowledge he has acquired. He is encouraged to ask questions, in order that his own individual needs may be met. And the professor's constant endeavour is, by teaching the law as a system of principles, by unfolding the reasons upon which those principles depend, by simplifying abstruse statements of doctrine, by citing illustrations drawn from the reports and from practical life, to give vitality and interest to the whole course of instruction, and to adapt it to the student's comprehension.'

Another criticism sometimes made is that text-books are used entirely, with only occasional reference to cases by way of illustration. Every student who has studied under this system will say that such references are not occasional merely, but are given constantly day by day, and that students whose advancement in legal knowledge is sufficient to enable them to read the cases to advantage, are urged and encouraged to do so; that the instruction is kept abreast of the latest developments of the law, and that the most recent cases of value, as well as those earlier ones which are treasured as great landmarks in legal history, are constantly brought to the student's attention.

In comparing the 'Dwight Method' with the 'Case System' of teaching, one of Professor Dwight's graduates has said of the latter that 'it may be styled a study by philosophical comparison of adjudicated cases which calls upon the student to discharge a critic's duties while he is yet a tyro, and requires original discrimination and judgment before he has mastered the alphabet of his profession —a system calculated to increase the student's perplexity, and to discourage his hopes.'

Numberless illustrative comparisons of the two systems could be

made, but the writer recalls one in particular, made by a well-known Law Review, in the following words:—

'There is just as much sense in endeavouring to instruct students in the principles of law by the exclusive reading of cases, as there would be in endeavouring to instruct the students at West Point in the art of war by compelling them to read the official reports of all the leading battles which have been fought in the world's history.'

The relative merits of the two systems have been thus characteristically stated by the brilliant editor of the Albany Law Journal in the number of that Review of June 6th, 1892:—

'The purpose of Columbia College (during Professor Dwight's incumbency) has always been to make lawyers; that of Harvard, to make men academically learned in the law as a science. No number of years, short of Platonic years, would suffice to teach the law by the Harvard theory, as, logically, it demands the examination and discussion of every case. We prefer the practical and pointed method of Columbia, which teaches principles, using cases as illustrations and proofs, to the Harvard method, which analyses and discusses a multitude of cases, and lays down the principle at the end, if that ever comes.'

Briefly stated therefore, the 'Dwight Method' of legal instruction may be called a recitation system, accompanied by abundant oral exposition by the instructor, and by the reading of illustrative cases by the student; whereas the 'Harvard' or 'Case' system aims to substitute the discussion of the actual authorities of the law for the taking of results from text-books. The 'Dwight Method' starts first with principles, is followed by oral recitation, and ends by a practical application of the principles learned by examining them in the light of authority in point; whereas the 'Harvard Method' starts with cases, is followed by exposition of the instructor, and ends with a deduction of the principle. By the latter method, the student is compelled at the very outset to assume the advanced position of a text-book writer, or a legal theorist, and to gradually emerge from the haze of confused authorities into the uncertain light of an evolved principle. By the former method, the student proceeds upon the natural method of comprehending great principles, and then by a process of deduction applying them to specific cases. It will be conceded that all other sciences and subjects of study are taught to beginners in the same way, and as Professor Dwight once pertinently stated, it is difficult to perceive why this method, approved by the experience of ages, should be inapplicable to the study of law.

GEORGE C. AUSTIN.

[It appears to us, looking at the controversy from the outside, that both parties exaggerate the differences between them, and underrate the fundamental resemblances. Between a methodical selection of cases, explained and supplemented by the living voice of the teacher, and the use of text-books enlivened and controlled by oral teaching and constant use of the cases, the gulf does not seem so much wider than the margin fairly permissible to the teacher's individuality. The available *students'* text-books, however, are still not many, and our own opinion inclines against the official use of them. As to the suggestion that lawyers are not or cannot be made at Harvard, *solvitur placitando*.—ED.]

THE PRESENT SYSTEM OF LAW REPORTING.

ON several occasions during the last few years attention has been directed (though not in these pages) to the fact that the decisions considered worthy of being reported fill the same number of volumes and almost the same number of pages from year to year. Prima facie it would be supposed that in some years the number of reportable cases would exceed those in others, and this will be found to have been the fact some seventy or eighty years ago, if we may judge from the perusal of the reports of that period. Prima facie also we might think that as reports have existed so long and have been for years past so outrageously lengthy we ought to be arriving at a time when everything reportable had been reported. Both of these reasonable presumptions have been falsified by the results. But to come to closer quarters:—During the last year and a half, one judge of the Chancery Division for months, and another judge of the same Division for a considerable period, have been incapacitated through severe illness from sitting in court, and with regard to the Probate, Divorce, and Admiralty Division, the health of the late President was such that the business for a long time was carried on by the other judge of that Division; under such circumstances it would have been thought that the size of the reports of those Divisions would have considerably decreased; when however the complete volumes were published, they were the same in number and similar in appearance (if anything they were larger) to those of many years before. The object of this article is to point out the mode in which these unexpected results were brought about, and to consider whether such a system should, in the interests of the profession, be allowed to continue.

Speaking generally the result was obtained, firstly, by reporting really unreportable cases, and, secondly, by publishing cases in themselves reportable but which for various reasons were wholly or partly of no value.

In order that we may discuss these two classes of cases we must endeavour to ascertain the meaning to be given to the words 'reportable' and 'unreportable;' without attempting an exhaustive statement, an approximate definition with examples will probably suffice for the present purpose.

A 'reportable' case is one that will be useful to the practitioner,

one that construes a somewhat ambiguous Act of Parliament of general interest, that lays down some fresh legal principle or applies a well-known principle of law to entirely different circumstances, that doubts, or as it is frequently termed by the more polite reporters, distinguishes a previous reported case; cases in short that add something to our legal knowledge. 'Unreportable' cases will therefore include the following examples: those turning on the special wording of a particular document that is generally subject to considerable variation, for in such cases, as many past and present members of the Bench have remarked, decisions on similar words in other documents are of little or no value; many decisions on the construction of Wills and Settlements should therefore be excluded, as well as those on contracts or other documents, the construction of which depends on their special terms. An exception to this class must however be made, namely with regard to cases on the construction of Bills of Lading and Charter-parties, for these documents have reached a fairly general form, and even if the form be not always similar, large shipping companies have general forms that govern the rights of a large number of persons; decisions on such documents are therefore useful to the practitioner. Let us take another example: cases that depend on the discretion of the court are nearly always useless, because judicial discretion is exercised after taking into consideration all the facts of the particular case; reporters try hard to fetter the exercise of a judge's discretion but do not succeed; a judge may be said to have followed a previous decision because he exercises his discretion in the same way as another judge had previously done, but there is no rule binding a court as to the exercise of its discretion. Ever since 1857, when the Court of Probate Act (20 & 21 Vict. c. 77) was passed, reporters have endeavoured to construct rules for the exercise of the discretion vested in the court under section 73 of that Act; six to twelve cases on this point are not uncommonly reported in a single year. The majority of them are useless, for a statutory discretion cannot be defined by metes and bounds. Again, cases turning upon the doctrine of Waiver, Acquiescence or Laches are for the most part useless; the rules governing these subjects are well defined; the only question that arises is not one of principle, but whether in each particular case these grounds of defence are an answer to the action. A further instance occurs in cases where the point to be decided is whether a covenant in restraint of trade is unreasonable and therefore not capable of being enforced, no principle is stated by the Bench, but upon the special wording and special facts the validity of that particular covenant is determined. Reporters would do as much good to the profession by reporting a case

at nisi prius, setting out the facts and contentions of the opposing counsel and the verdict of the jury. Space will only allow us to give one more instance: it sometimes happens that counsel, from one cause or another, have failed to discover a case that really decides the question at issue. We frequently hear it said that the authority of *Smith* v. *Jones* is shaken because another case in the books was not cited to the court; the report of such a case is not only useless but misleading. The duty of a reporter is not only to report but to see that what he reports is as far as he can tell sound law; in order to discover whether a decision is good law, time must be spent in looking through text-books and older reports. This no doubt requires a considerable amount of legal knowledge and is irksome work, but it is none the less one of the first duties of a conscientious and thorough reporter.

We will now give some examples of the second class of cases mentioned above, viz. those that are in themselves reportable but which for various reasons are wholly or partly of no value. Let us first of all deal with those wholly valueless. In the same report one finds the case in the court below set out at length, and then follows the same case in the Court of Appeal. If the same point is decided in both courts, the former is useless, whether the Court of Appeal affirm or reverse the decision. We contend further that sufficient pains are not taken to ascertain whether a decision will be appealed from; it is a most common occurrence for a case to be reported in the court below and appear in the reports about the same time as the hearing of the appeal, necessitating another report in the course of a month or two, in other words, involving a waste of space. Some may raise the objection that this suggested holding back of cases is improper; the objection at first sight may seem good, but we think that the notes of cases that appear week by week should be used much more than they are at present, and should include important cases in the court below that are certain to be appealed. The 'Weekly Notes' tells us every week that all cases of permanent interest noted therein will be reported in full in the Law Reports; if this statement could be depended on, very many useless cases would be eliminated from the Law Reports, and our suggestion would be carried out in practice as well as in theory. Again, one frequently reads a head-note in which we fancy we recognize a familiar and aged friend: sometimes the head-note frankly tells us of *Brown* v. *Robinson* followed and approved, sometimes the reader has to consult the judgement to discover that it consists of a couple of pages transcribed from an older report with the reasoning of which the judge fully concurs. If the Court of Appeal or House of Lords had for the first time followed and approved a decision of

a court of first instance, there would be little ground for criticism, but strange as it may seem, this type of case usually occurs when courts of first instance follow and approve cases decided by the Court of Appeal or even by the House of Lords. Assuming however that it is useful to show that old cases are still recognized as law (which assumption we do not for one moment allow), this excuse cannot possibly apply to cases decided a year or two back, but notwithstanding this the various series of reports are full of such cases; every one will agree that piling up authority upon authority is superfluous and therefore useless. Cases that are partly valueless must now be considered: let any one look through some of the older reports of say seventy or eighty years ago, he will find the side-note of reasonable length, the statement of facts short, the judgement of moderate dimensions; let him compare such reports with those of to-day that have a head-note of a page or two, statements of facts of considerable length, arguments of counsel twelve or fourteen pages, and a judgement of perhaps thirty pages, and then let him consider the time the profession loses in reading such a production. It cannot be too strongly urged that if a case affords an illustration of a well-known principle, the profession does not gain by that principle being smothered in a mass of facts. A principle stated in six lines of a head-note is one thing, a conglomeration of facts with copious extracts from documents, and possibly fifteen or twenty letters of the alphabet representing persons or places, is another. The chief reasons for the excessive length of modern head-notes appear to be these: a mass of facts and other superfluous matter is necessary to avoid the head-note being in similar terms to a side-note in an older report that has been cited to and approved by the court, or the statement of any clear legal principle is impossible owing to the special character of the decision, or the reporter is unable or unwilling to give the time and trouble necessary to sift out the legal grain from the surrounding chaff of facts. Again, head-notes often contain several sections of Acts of Parliament set out at length. This practice is nearly always reprehensible, though the gist of the sections might be usefully mentioned. Let us suggest a convenient form of head-note, 'Under section — of the Metropolis Building Act, 1855 (which relates to party structures), the building owner cannot,' &c. In this connexion we may say that it is not at all an uncommon thing to find lengthy sections set out in full, once in the head-note, once in the statement of the case or in a foot-note, and once in the judgement if the case is decided by a single judge; should the case be in the Court of Appeal we shall probably find the sections in each of the judgements. A *semble* is clearly a proper subject of a head-note, but a query is in almost every instance useless,

for in such cases the court offers no opinion; if an opinion is offered, that dictum would be a *semble*[1].

Having discussed the demerits of the present system, it becomes necessary to endeavour to point out the causes that have occasioned and are still occasioning its use.

1. The profession desires to obtain the largest number of books of the largest size in return for the yearly subscription, in other words to buy the largest possible quantity for the money expended. As things now are, the profession must be content to take whatever kind of reports are supplied, and it is only the profession rising in revolt against the present system that will bring about any amendment. Let us put the matter as a pure question of money, let the profession ask itself how much time it would save every week if the various reports were properly done and took up about one-third to one-half of the present number of pages; with busy men at the Bar this curtailment would effect a saving of several hours every week; take those hours saved by each member of the Bar and add them together and then we can find out approximately how much money is lost every year by the Bar under the present régime. The other branch of the profession loses also, though not perhaps to the same extent.

2. Reporters desire to be considered energetic and painstaking by the editor or proprietor of the particular series and thus avoid the receipt of letters of reproof or complaint as to the matter sent in or not sent in by them, the test of energy being whether every case reported in any other series is forwarded by them to the editor, the test of painstaking whether their efforts have produced as much or more 'copy' than any one else has succeeded in writing. Energy and painstaking with influence may also advance reporters from a worse paid series to a series which pays better; and here it may be mentioned that the remuneration of the reporter is said to be sometimes dependent upon the *length* of matter supplied by him. Such a mode of payment will hardly produce the best results. Timidity also induces long reports; we occasionally hear from the Bench that a fact in a case or a passage in the judgement contained in one report but omitted in other reports makes sense out of nonsense or renders intelligible what without it would be of doubtful import; this remark every reporter wishes to avoid being made as to anything reported by him, he therefore goes to the opposite extreme and omits nothing.

3. Editors and proprietors of the various series desire to make their own publication eminent to the detriment of their rivals,

[1] [Many a profitable *quaere* may be found in the reports of the last generation and farther back. But these are the reporters?—Ed.]

in other words to increase the sale of their own production; they therefore endeavour to include every case reported elsewhere as well as a number of others not elsewhere reported. We remember seeing a statement that was intended as a good advertisement, that a certain series contained a certain number of cases more than any other contemporaneous series. Sometimes a subscriber to series A, finding out that the unreportable case of *Smith* v. *Smith* is not reported there, though series B, C or D contain it, writes to the editor a letter of complaint; the editor thereupon calls upon the reporter implicated to explain; the result is that *Smith* v. *Smith* appears in series A many months later than it ought; and perhaps if the reporter implicated has sent in for publication only a few cases, he will be ordered to compile a batch of ten or fifteen cases, all 'unreportable,' but reported in one or more of the competing series.

4. The Bench sometimes desires to have decisions reported over which much time and care have been spent; it must readily be admitted that this cause has but little effect on the present system. There is also a tendency on the part of some members of the Bench to disregard older decisions, and to enquire whether there are not modern cases exemplifying the same point. It seems reasonable that any case in the books, however old it may be, should be considered good law until it has been doubted or swept away by the ruthless hands of a superior court.

Let us now sketch out some measures that are necessary for the reform of our present system:—

1. The profession must be educated to regard the merits of a particular series from the point of view of quality, not quantity, of intrinsic worth, not pounds avoirdupois. In ordinary life men's tastes and inclinations are formed and improved by their surroundings in a far greater degree than some persons think; legal tastes and inclinations are governed by the same rules. In ordinary life there is plenty of variety in matters of food, dress, or books, but men's legal tastes and inclinations must put up with the present system or go without reports altogether: as things now are, our legal food is too diluted or adulterated, we have to get through so much to obtain so little, the husk is so thick and the kernel so small, that in the mass of useless envelopes we stand a chance of losing part of the kernel altogether. We or some of us want the legal principles contained in the reports laid bare by the reporter, at present we only get this on special occasions. We or some of us want our time saved, but no series gives us exactly what we want; some approach our ideal more nearly than others, but none dare to break loose altogether from the system now in

vogue. If a higher standard in reporting could be obtained, many persons at present insensible to its advantages would be aroused, they would then discover how bad the older order of things was and wonder that they allowed it to exist so long. Again, a higher standard of head-notes would render codification far easier than it would be under the present style of those productions.

2. Besides the reporter's duties to which we have already referred, we think that conciseness is the soul or essence of proper law reporting. To attain this result the reporter should carefully eliminate everything that is not essential to the actual point he intends to report; it is of course necessary for a reporter to take down on his notes a great deal that is rendered of no value by the ultimate decision, but all this superfluous matter must be excluded before the manuscript is sent in to the editor. In a large majority of reported cases the contents of documents and facts set out have as little connexion with the actual decision as the dialogues in many a modern novel have with the plot. A reporter should not advertise himself or his friends by reporting useless cases in which he or they appeared as counsel, neither should he send in reports of cases in which he acted as *amicus curiae* by telling the court of a very modern case on all fours. Nearly all the remarks made by the Bench in argument should be omitted, the judgement should not be as it usually is, when possible, a transcript of the shorthand notes. We may here parenthetically observe that shorthand, though extremely useful when properly used, is just now a positive hindrance to a good report; judgements that have not been taken down in shorthand are as a rule superior to those in which the reporter's clerk has written out a copy from the transcript. One of the best tests whether a case is reportable or unreportable is the length of the head-note: if no head-note can be made to enunciate a legal principle without setting out half a page of facts, the case is useless to the profession; if a head-note consists of half a page or more of facts, and at the end of those facts one reads, 'Held, that the plaintiff could not recover,' or, 'was not entitled to the relief claimed,' we may be sure that our publisher has presented us with an illustration of a well-known doctrine without giving us an opportunity of reading that doctrine in a crystallized form.

3. Editors and proprietors of the various series should exercise a stricter supervision over the cases forwarded to them by their reporters and should see that the latter have not shirked any of their duties. On several occasions one has noticed the same case to have been reported more than once in the same series; sometimes indeed the case will be reported in the Court of Appeal, and then

perhaps two months after it will appear as reported in the court of first instance, without any reference to the prior report. Editors should have power to lay down and should promulgate strict rules for the guidance of reporters, in order that the latter may determine what cases should be sent in for publication and what should be excluded; editors should also be on good terms with their reporters, so that the latter may readily ask for an opinion as to the reportability of any doubtful case, for it is annoying to a reporter to have taken the trouble of sending in a careful report and then find it pigeonholed.

4. It will probably be admitted by all who read this article and refer to the cases reported during the last year, that a large amount of useless matter is contained therein that ought to be excluded. Its exclusion means an entirely new system; we cannot have the volumes of reports brought to a close at the end of the year; we must give up having twenty-eight pounds of Law Reports every year, and lesser weights of other series; the volumes must finish when there is sufficient matter of a proper kind to make up a given number of pages. We may here mention that the new mode of citing the Law Reports will not fall in with the above suggestions. Many persons whose opinion was entitled to some weight thought badly of the proposed new method and signed various petitions to the Council of Law Reporting; their views were however disregarded, and the Council sent round a circular giving reasons for the impending change. The chief argument contained in that document was that the year date was of extreme importance; now if all cases decided in 1892 are to be found in [1892] 1 and 2 A, B, or 1, 2 and 3 Ch., &c., this might have been really useful, but we all know that it is quite impossible for the year date to be anything more than an approximation to the true date; we could fix on an approximate date without the new method of citation by some easy *memoria technica* that should include not only one but every series of reports, and thus render the new citation useless. Another objection to the new method is that with every additional figure there is an additional chance of error in the manuscript or in the printing. We repeat that this new mode of citation offers a very great stumbling-block to any satisfactory reform. Assuming we are right in thinking that the size of the yearly reports should be from one-third to one-half their present size, there would be a reduction of two-thirds to one-half of the present cost of printing; the amount of annual subscription therefore could then be diminished. If our objections to the present system are good, it would appear that the only persons to benefit by things remaining as they are, are those engaged in printing and publishing the

series. As the Law Reports are supposed to exist for the benefit of the profession, the first consideration should be, not the interests of those producing the volumes, but the wishes of the profession itself. The Law Reports commenced some twenty-seven years ago with the avowed object of providing the profession with reports in all the courts at a reasonable price; much good was done by that movement in the direction of economy, much still remains to be done in the direction of utility. The enormous circulation of the Law Reports and the vast influence they exercise place them in a favourable position to try an experiment which, if properly managed, is sure to command success, viz. to give up the present vicious system and take as their examples the reporters of bygone days, instead of making themselves a party to a business speculation in which they take all the risks but are debarred from receiving any of the profits arising therefrom. The Law Reports have taken and will have to take the lead in any reform, for the other series are professedly published as a matter of business; but the influence of the Law Reports, if used aright, will cause the other series to follow in their footsteps in the future as they have done in the past; then the profession will have still further cause for thankfulness that the Law Reports exist and are guided by those principles that are best suited to further the interests of the profession and to supply its wants.

JOHN MEWS.

REVIEWS AND NOTICES.

[Short notices do not necessarily exclude fuller review hereafter.]

The History of the Doctrine of Consideration (Yorke Prize Essay, 1891). By EDWARD JENKS. London: C. J. Clay & Sons. 1892. 8vo. 225 pp.

THIS is a meritorious and promising piece of work which fully deserves its place in the series of Yorke Essays. Any one who has to traverse the ground that it covers will do well to consult it. Some of its peculiar features, though they may surprise, should not offend us. Mr. Jenks follows the example of Mr. Seebohm and Mr. Vinogradoff, and writes history backwards; and for this procedure there is much to be said, since the law of comparatively modern times is one of the best sources of such information as we have about the law of darker ages. Also, in dealing with modern times, he puts the statements of text-writers in the forefront, and this procedure seems to us justifiable by one whose object is not dogmatic but historical. More, even in our own day, depends upon the work of text-writers than they in their humility are apt to think. In particular we should say that our modern law of contract would not be nearly so precise as it is, were it not for the labours of those who have endeavoured to expound it in a systematic shape.

We are not of the number of those, if any such there be, who think that the writing of useful history of necessity implies the making of new discoveries, or that the embryonic stages in the growth of an institution or a doctrine are the most interesting. Still we must confess to being a little disappointed with the part of this essay which speaks of the origin of 'consideration.' We should not say this did we judge Mr. Jenks's work by the standard which we should apply to every winner of an academic prize; but his other books are a sufficient assurance that this is not the measure by which he would wish to be tried. Nor are we blaming him. We may learn from his preface that the essay was written at Melbourne, and that he had not the command of some books which would have been very useful to him and would have kept him out of those few definite mistakes with which he can be charged. But in several respects we cannot accept as final his treatment of the problem that was before him. In the face of Mr. Salmond's article, published some years ago in this REVIEW, more than one sentence—and that is a too scornful one—should have been given to the theory that our *consideration* is the *causa* of the canonists. 'One really fails to see that it [the doctrine of consideration] would commend itself with any force to the minds of ecclesiastical schoolmen, who looked upon interest as unholy, and money as the root of all evil.' This is *a priori* speculation; and to call the great canonists 'ecclesiastical schoolmen,' and accuse them of inadequate worldliness, is an error that Mr. Jenks will not repeat now that he is within reach of their books. And in other cases—so we venture to think—he has

too hastily cast away good materials without sufficiently testing them. 'We may take it,' he says, 'that the feoffment, the grant of incorporeal hereditaments, the common law lease and release and the confirmation, did not require consideration. *A fortiori*, the conveyance by fictitious law suit—the fine or recovery—did not; in fact, the recognition of a consideration would have been inconsistent with the theory of such a conveyance.' If Mr. Jenks had found among his books any collection of ancient fines, instead of writing thus he would have said that every ancient fine invariably shows a *quid pro quo* expressly stated in its '*et pro hac*' clause. A collection of ancient charters, and the ancienter the better, might have led him to doubt, with some German writers, whether our remote ancestors could conceive a really 'voluntary' gift of land. They may be satisfied with 'past considerations,' services already done, and with 'other-worldly' considerations; but it is fairly clear that they think the better of a charter which states the receipt of *quid pro quo*. And the pence or the toy put into the hands of the baby who is supposed to be confirming his father's gift, and the God's-penny which binds the bargain, and the sham-pledge, the glove or rod or hair of one's head which serves as a *vadium*—all these things require discussion.

On the whole, Mr. Jenks, when the question of origin is raised, is content to follow Mr. Justice Holmes, though with some deviations. He could follow no better master, but we have the misfortune to think that for once the master has erred. The connexion between the plaintiff's *secta* and the official 'transaction witnesses' of Anglo-Saxon law seems to us unproved and improbable. The *secta* is required by an exceedingly comprehensive rule of Norman and Anglo-Norman law, namely this, that no plaintiff or demandant is entitled to an answer unless he tenders a witness, or (in England) several witnesses, who will profess a willingness to support his allegations should this be demanded. There are but two exceptions to this rule of any importance. One is that in an appeal of felony, where the plaintiff himself has to offer battle, no *sectator* is necessary, probably because the prosecution was begun with hue and cry. The other is that which obliges the man to answer his lord or his lord's officer, even though no suitor be produced. At this second exception Magna Carta strikes; even the royal bailiff must find suitors. No matter then whether the plaintiff has to allege a contract, or a blow on the nose, or a slander, or the seisin of his father, he must bring suit. The most ingenious of commentators has as yet found no Anglo-Saxon text which says that every tort must be done in the presence of official witnesses; but so soon after the Norman conquest as the procedure of our courts, high or low, becomes apparent there is a rigid rule that every one who complains of a tort must tender a *secta*. However, though we cannot think that Mr. Jenks has solved the problem, he has made the solution easier by his essay.

Prideaux's Precedents in Conveyancing, with Dissertations on its law and practice. Fifteenth Edition. By JOHN WHITCOMBE. London: Stevens & Sons, Lim. 1893. La. 8vo. Vol. I. xlviii and 859 pp. Vol. II. xliii and 884 pp. (£3 10*s.*)

THE fact that this book has reached the fifteenth edition shows that it has been found useful. While perhaps it has never enjoyed the same position as the Precedents of the late Mr. Charles Davidson, it has always had a large circulation, especially among solicitors. The precedents have the merit of being arranged so as to enable any ordinary draft to be prepared by a clerk with but meagre instructions from his principal. The

present edition is brought out by Mr. Whitcombe alone owing to the lamented death of Mr. Frederick Prideaux. The principal changes consist in the consolidation of the dissertations on 'Conditions of Sale' and 'Agreements for Sale' into one, and in the insertion of a dissertation on 'Registration of Title' followed by precedents of 'Instruments relating to Registered Land.' The Conveyancing and Settled Land Acts are no longer set forth at length in the Appendices. All these changes are improvements.

The dissertations and notes have always formed an important part of this book, and are of considerable value; but we think that in some places further words of warning would have been of use to the inexperienced practitioner. For example, beyond stating in a note that the decision of North J. in *Re Jeffery, Burt* v. *Arnold* (1891), 1 Ch. 671, has no application to the ordinary trusts for children in a marriage settlement, the editor ignores the grave doubts which exist as to whether the statutory power of maintenance conferred by the Conveyancing Act, 1881, s. 43, applies to some of the cases which occur not very rarely in practice. He does not even add a note to that effect to the precedent (vol. 2, p. 344) of a settlement of personalty in the usual form, excluding a son who is or becomes tenant in tail, a case in which many if not most conveyancers would, in the present state of uncertainty as to the law, consider it proper to insert express provisions as to maintenance.

Again, it would have been useful to add a note to the precedent (vol. 2, p. 417) of 'an appointment of a sum of money to a son and release of the donee's life interest, so as to enable the money to be raised at once,' pointing out that, where the tenant for life releases his interest in the trust funds themselves, instead of in a sum of money to be raised out of them, the transaction may possibly amount to a voluntary settlement within the meaning of the Bankruptcy Act, 1883.

Notwithstanding these omissions, there are some parts of the dissertation which appear to contain all that can be required; we particularly call the reader's attention to 'Searches for registered documents and incumbrances,' vol. 1, p. 128 *et seq.*, and the luminous account of the death duties, vol. 2, p. 538 *et seq.*

A Treatise on the Construction and Effect of Statute Law. By Henry Hardcastle. Second Edition, Revised and Enlarged. By W. F. Craies. London: Stevens & Haynes. 1892. 8vo. lxxi and 659 pp.

Mr. Craies tells us that he has 'followed in the main the method and arrangement of the first edition' of this not very well known work, but that 'very considerable additions and alterations have been made' in order to bring the book up to date, to include the substance of the decisions given since 1879, when the first edition (originally projected by the author in concert with Mr. Edward Jenkins, M.P.) made its appearance, and to make the work 'as far as possible a complete book of reference on the subject of statute law.' The additions have been considerable indeed, the book having in fact been nearly doubled in size, and we are glad to find that the quality of the editor's work compares well with its quantity. Research, care, and acuteness are visible on almost every page, whether the difficulties of draftmanship are being treated of, or the 'general rules of construction where the meaning is plain,' or the distinction between 'absolute' (or as they should rather be called imperative) and directory enactments, or the meaning

of the expression 'penal act' is being enquired into, or the importance of the Interpretation Act 1889 is being dwelt upon, or the serious objection to the wholesale repeals of preambles by Statute Law Revision Acts is being pointed out. Here and there, however, we have detected too great diffuseness, as where a whole page is devoted to *Earl of Shrewsbury* v. *Scott*, 6 C. B., N. S. 1, in which the question whether a private Act was repealed impliedly by the Roman Catholic Relief Act was decided in the negative, and Mr. Hardcastle's rule 'never to refer to a case without *either* quoting a dictum from it, *or* stating shortly the point decided,' has, we think, been a little too often followed in the direction of the first alternative.

There is a good and full table of 'certain words and expressions used in statutes which have been judicially or statutably explained,' and another table of popular or short titles of statutes, in which we are glad to observe that the frequently overlooked distinction between Palmer's Act and the Palmer Act is properly brought out, and repealed Acts are neatly marked as such. The massive Short Titles Act, which Mr. Craies in some measure had anticipated, is also sufficiently attended to. There is a good index, each chapter is furnished with a remarkably efficient table of contents, and the table of cases has references to all the reports where the cases are to be found, with dates. *Quid plura?*

Paley's Law and Practice of Summary Convictions. Seventh Edition. By Walter H. Macnamara. London: Sweet & Maxwell, Lim.; Stevens & Sons, Lim.; Butterworths. 1892. 8vo. xxxii and 648 pp. (24*s*.)

The seventh edition of Paley on Summary Convictions is prefaced by an interesting list of previous editions, from which we learn that this excellent work first appeared in 1814, and that the last edition has lasted for exactly the average time of the lives of its predecessors, namely 13 years. The work is so well known both to practitioners and students that it needs but a few words from us. There are difficulties which an editor of an old work will always have to contend with, founded on the fact that the relative importance of different parts of his subject-matter is open to continual change. In the present volume we should for instance like to have the subjects of Apprehension, Appearance, and Default, treated in three sections instead of one. At the same time there are usually excellent reasons for not changing the ground-plan of a well-established work. We doubt whether any valuable general information on the topic of Evidence can be given in 15 pages, unless in a strictly tabulated form, and the space which Mr. Macnamara has devoted to the purpose would probably have been very useful to him elsewhere. In a well-arranged Appendix are found the three Summary Jurisdiction Acts, and a small but very useful collection of the most important of the official forms. Altogether the high reputation of the work will not suffer by the present edition, and we hope that the average of 13 may be reduced to a more seemly number.

The Law of Evidence. By Sidney L. Phipson. London: Stevens & Haynes. 1892. 8vo. lxxi and 448 pp.

Mr. Phipson informs his readers that in preparing this volume he has endeavoured to supply a work of general utility, on such a scale as to 'take a middle place' between the condensation of Sir James Stephen's 'Digest'

and the discursiveness of 'Taylor on Evidence,' and he has performed that task with a considerable degree of success. While he has not precisely, or indeed very closely, followed the scheme of arrangement of Sir James Stephen's book, he has arranged his matter, and made his volume something more than a dictionary. He treats in his 'Book I' of the Production of Evidence, and in 'Book II, Part I' introduces under the title 'Admissibility of Evidence' nearly all the law of which he has to treat, the two other 'Parts' of Book II dealing respectively with 'Witnesses' and 'Documents,' and 'Book III' containing nothing but a chapter on Presumptions and Estoppels. Mr. Phipson does not, in our judgement, allot sufficient importance to what is called 'the rule of best evidence.' He holds it to be 'extremely doubtful' whether 'the law of evidence has been perceptibly moulded by any principle so philosophical and invariable,' and considers that 'in the present day, the maxim affords but little practical guidance.' We should say rather, that when a doubtful case of admissibility arises one of the first and most useful things to be considered is the application of the rule of best evidence. The fact that there is now a considerable amount of case-law bearing upon the topic does not, as Mr. Phipson seems to think, in any way impair the value of the principle upon which those decisions were founded. A feature of Mr. Phipson's book which seems likely to prove useful is the printing of 'illustrations' for the most part in parallel columns, the one headed 'Admissible' and the other 'Inadmissible,' care being taken to put in juxtaposition with each other cases where the facts are as much alike as may be. In respect of citing authorities and giving references the book is very much to be commended. Inasmuch as Mr. Phipson's strength lies rather in substance than in arrangement, it may be that his work will be rather more useful to practitioners than to students.

Seton's Forms of Judgments and Orders. By the late Hon. Sir H. W. Seton. Fifth Edition, by Cecil C. M. Dale and W Clowes. Vol. II. London: Stevens & Sons, Lim. 1893. La. 8vo. xlvii and 749–1772 pp.

It may very well be that the late Sir H. W. Seton was a greater man as a judge in Calcutta than as an equity draftsman in Lincoln's Inn. But his fame in Lincoln's Inn is incomparably the greater. Here, like one Wigglesworth, he has 'built himself an everlasting name.' Nor will his reputation suffer while it is in such hands as those of Mr. Dale and Mr. Clowes. Their second volume is a monument of learned and laborious accuracy. 'Seton' in the fifth edition will be represented by three portly volumes, containing in all some 2700 pages, as against the two volumes and a half—so to speak—to which practitioners of equity are accustomed. The pagination is to run uninterruptedly through the three volumes—an excellent plan—and we await the third volume, which is to contain the indices, tables, and apparatus generally, with a measure of impatience. To form an estimate of the care bestowed upon the volume in our hands, we have compared it with the corresponding volume of the fourth edition upon a single not unimportant point. The form given in the fourth edition for delivery of heirlooms to a tenant for life was taken from a case of *Clarke* v. *Ormond*, in 1821, and suggested that the life tenant should give security to be duly approved (Seton, 4th ed., p. 1263). The page to which we have referred contained no reference to a previous page (955), upon which it was stated that the present method is for an inventory to be

signed by the tenant for life and to be deposited in Court for the benefit of all parties. The two statements were not altogether consistent. In the present fifth edition the statement of the inventory being required survives, with an additional reference to the new case of *Temple* v. *Thring* (56 L. J. Ch. 767). But we have searched the volume in vain for any reference to the misleading form in *Clarke* v. *Ormond*. This illustration will serve to show that 'Seton' in its new guise is even more trustworthy than it was. And this is the highest praise we can give the book.

The Law of Marriage and Family Relations. A Manual of Practical Law. By NEVILL GEARY. London and Edinburgh: Adam & Charles Black. 1892. 12mo. xlii and 637 pp.

THIS book is intended not only for the use of the practising lawyer but also for that of laymen, and in spite of the proverbial risk of slipping between two stools we think that the author has succeeded in his task. The lay reader will of course not forget that a book which discusses the grounds of divorce necessarily contains some passages not adapted for general reading. The greater part of the book is devoted to the law of marriage; that of infancy being only shortly dealt with.

Among other more or less novel features is a pretty full chapter on the modern Canon Law. Mr. Geary says (p. 483 note), 'The Canon Law is not legally binding in the British Dominions, or (it is believed) in any other country.' [*s. q.* We believe that there is, or was not many years ago, no other marriage law in some of the Catholic cantons of Switzerland.] But it is the law of the Roman Catholic Church; it binds the clergy as matter of discipline; and the laity, so far as they live in obedience to the Church, as matter of conscience.

The author points out that notwithstanding the rule of the Roman Catholic Church that marriage is indissoluble, in some cases persons when civilly divorced may be remarried by a Roman Catholic priest, even though they have added the Catholic form of marriage to the requirements of the civil law governing their status as married persons. Mr. Geary's statement is so worded that it looks at first sight as if civil marriage in a country where divorce is allowed were regarded as generally void *ab initio*. But this would not only be a harsh and impossible doctrine, but would lead to the contrary result. For then there would be nothing but the Catholic marriage, and (except in the special case to be mentioned) it would be indissoluble. The true doctrine, which (with the learned author's courteous assistance) we have taken some pains to ascertain, is that, since the Church allows only permanent marriage, marriage under a civil law permitting divorce is canonically void *if the parties marry on the understanding that they may make use of such permission*. And it seems that, if such is their intention, the addition of the Catholic rite will not make any difference. For in such a case there is no real consent to the only marriage recognized by the Church.

The appendices contain some information, which, so far as we are aware, is not to be found elsewhere. Mr. Geary explains why marriages can be solemnized in some Cathedrals and Chapels Royal and not in others. He has collected the religious opinions and practice as to divorce and the marriage of divorced persons; and he gives an interesting account of the proceedings taken by Henry VIII to obtain a divorce from Catherine of Arragon looked at from the point of view of a canonist: Mr. Geary's opinion is that 'the king's case was eminently arguable.'

Shelford's Real Property Statutes, comprising the principal Statutes relating to Real Property passed in the reigns of King William IV and Queen Victoria with notes of decided Cases. Ninth Edition. By THOMAS H. CARSON, assisted by HAROLD B. BOMPAS. London: Sweet & Maxwell, Lim.; Stevens & Sons, Lim. 1893. La. 8vo. lxxxv and 847 pp.

WE have always found Shelford's Real Property a very useful book. It has the great merit of not only discussing all the cases arising on the statute under consideration but also of giving an admirable epitome of the law existing before the statute. Considering the vast number of topics treated of in the book it has always been a matter of surprise to us to find how free it is from errors. During the lapse, however, of twenty years since the last edition many changes in the statute law have been made, so that the book required to be brought up to date. The New Acts discussed wholly or in part in the present edition are The Real Property Limitation Act, 1888; The Trustee Act, 1888; The Married Women's Property Act, 1882; The Land Charges Registration and Searches Act, 1888; The Lunacy Act, 1890; The Vendors and Purchaser Act, 1874; The Conveyancing Acts, 1881 to 1892; and The Settled Land Acts, 1882 to 1890. The editors have exercised a wise discretion in omitting some Acts discussed in the former edition which have been repealed or become wholly or partially obsolete. We confess that, having regard to the very high opinion which we had formed of Mr. Shelford's work, we perused the new edition with some misgivings. Our fears, however, have been agreeably dispelled. The present editors have performed their task most admirably. A somewhat careful examination of the new edition shows that the editors have omitted hardly any case of importance. Their discussions of the new statutes are at once clear and accurate, and are marked with the same good sense that always distinguished Mr. Shelford. We venture to say, and we can hardly give higher praise, that this edition will become as useful as the last.

A good example of the style of the editors will be found at p. 327, where they discuss the effect of the Married Women's Property Act, 1882, on the contracts of married women. The passage is too long to cite, but on investigation it will be found that the statements contained in it are clear, concise, and accurate. As a minor matter, the editors have remembered that their book will often be consulted by old people, and with a decent regard for their infirmities they have used type somewhat larger than that employed in the former edition. There is a full index, and the cases are brought down by means of the addenda to November, 1892.

A Treatise on Wills. By THOMAS JARMAN. Fifth Edition, by LEOPOLD GEORGE GORDON ROBBINS. London: Sweet & Maxwell, Lim. 1893. La. 8vo. Two Vols. cl and 1868 pp. (£3 10s.)

THE Precedents of Conveyancing by Mr. Robbins was a very good book, therefore we expected to find good work in the book now before us, and we have not been disappointed. The editor has exercised wise discretion in abbreviating the remarks of the author on points relating to the law of wills before 1838, and has thereby obtained room for the discussion of the many decisions on the construction of wills that have been made since the fourth edition appeared. A very useful part of the present edition consists in the suggestions contained in the appendix as to the preparation of wills intended

to operate abroad or in the colonies, where information will also be found as to the formalities of execution and attestation required to render them valid.

From the nature of Mr. Robbins' task he has had but few opportunities of introducing original matter, and has mainly confined himself to correcting the text in conformity with recent decisions. The small amount of new matter, however, is very good. Examples of this will be found at p. 966 et seq. 'Gifts to executors when annexed to the office,' and at p. 249, where the arguments against the rule of double possibilities being in force at the present day are stated with the utmost clearness.

There are a few minor points which will be found very useful. There is a table of comparative reference for the old reports and the Revised Reports, the text has been broken up into sections and subsections, with appropriate headings printed in type likely to catch the eye, the index has been enlarged, and the headings and sub-headings in it are distinguished by appropriate type. We congratulate Mr. Robbins on the excellent manner in which he has accomplished a very difficult task.

We have also received:—

The Annual Digest, 1892. By JOHN MEWS. London: Sweet & Maxwell, Lim., and Stevens & Sons, Lim. 1893. 8vo. xxxv and 413 pp. (15*s.*) *The Complete Annual Digest*, 1892. By Mr. Registrar EMDEN, HERBERT THOMPSON and W. A. BRIGG. London: W. Clowes & Sons, Lim. 1893. 8vo. lviii and 480 pp. (15*s.*)—Emden has rather more cases (including the Times Law Reports, and a selection of American decisions). Mews is more concise, the head-notes being revised. Between the completer Emden and the neater Mews the learned reader must choose according to his taste.

La société anonyme en droit allemand. Étude systématique d'après la loi du 18 juillet 1884. Par FÉLIX-M. BING. Paris: G. Pedone-Lauriel; Berlin: Carl Heymanns Verlag. 1892. 8vo. 416 pp.—We do not know of any book so well adapted for the purpose of giving readers outside Germany a clear and complete conception of the leading characteristics of German Company Law as the work before us. Without going into any minute controversial points, the author refers to all the more important difficulties in the interpretation of the law, and his criticisms and suggestions show an extensive knowledge of other European systems as well as considerable practical familiarity with the legal and economical problems connected with the subject. The translations from the German text are admirable both as regards lucidity and facility of expression and accuracy in the reproduction of the original. An alphabetical index would be a useful addition.—E. S.

The Egyptian State Debt, and its Relation to International Law. From the German of Dr. WILHELM KAUFMANN. With a Synopsis, &c., by HENRY WALLACH. London: Fred. C. Mathieson & Sons. 8vo. x and 308 pp.—In his translation of Dr. Kaufmann's book Mr. Wallach wisely includes that of laws, &c., promulgated in French and Italian, and given by Dr. Kaufmann himself in the original languages. But Mr. Wallach does not content himself with the position of a mere translator, he adds a synopsis of much practical value, comprising a brief account of the area, population, territory, and financial position of the Egypt of the present day, with short biographies of its sovereigns, from Mehmet Ali, who came to power in 1805, down to Abbas Pasha Helmy, his great-great-grandson, who became Khedive on Jan. 7, 1892. The Egyptian debt is of recent growth, the first (very modest) loan having been contracted by Said Pasha, third son of Mehmet, who

reigned from 1854 to 1863. The amount of indebtedness on July 1, 1892, was £106,459,160, rather an alarming sum, but it may be as well to mention that the various issues bear very fair prices on the London Stock Exchange, the 5 per cent. loans standing at 102½–103, the four per cents. at about 97–98, the 3½ per cents. at about 87–92. The statistical information liberally given in the synopsis can only be touched upon here; at pp. 302–304 we find the estimates for 1892, the revenue being summed up at £10,205,128, the expenditure at £9,641,026; surplus £564,102, after allowing for the service of all the debts. The synopsis ends with an extract from a report of Sir E. Baring, predicting a happy future for Egypt 'so long as the political situation remains unchanged.' Dr. Kaufmann's work is thorough and comprehensive; it may be mentioned, among other points, that the legal right of Egypt to contract loans, and the more practical question whether it is possible to enforce claims against her, are fully discussed, and that the 'Law of Liquidation' of July 17, 1880, is given *in extenso*.

The Pocket Law Lexicon, explaining Technical Words, Phrases, and Maxims of the English, Scotch and Roman Law. Third edition, revised by H. G. Rawson and J. F. Remnant. London: Stevens & Sons, Lim. 1893. Sm. 8vo. viii and 372 pp. (*6s. 6d.*)—Like all manuals of the kind, this book presents inequalities. 'Land Commissioners' appears without any mention of the recent transformation of that body into the Board of Agriculture. Under 'Copyright' there is not a single reference to any statute, nor is the Convention of Bern or the American Copyright Act mentioned. The student of Roman law who turns to 'noxal action' will learn with some surprise that (by necessary inference) a *filius familias* was an irrational animal. As a brief glossary of technical terms the volume is handy, and doubtless useful and sufficient for all purposes for which any sensible person is likely to use it. These purposes will not include medieval antiquities, still less the Anglo-Saxon period. A concise and frankly modern law lexicon is still a desideratum.

A Digest of the Law of Easements. By L. C. Innes. Fourth Edition. London: Stevens & Sons, Lim. 1893. 8vo. xxii and 122 pp.—This, the latest edition of a now well-known work, brings down the authorities upon the subject of easements to the present time, but in other respects does not differ in form or matter from the book as it first appeared in Madras in 1878. It was originally written by Mr. Innes, then a Judge of the High Court at Madras, with a view to facilitate the introduction, then contemplated and since effected by the Indian Easement Act, 1882, of a chapter on the law of servitudes into the Indian Civil Code. The principles stated in Mr. Innes's book have in fact been largely adopted in the Indian Act, and it may not be too much to hope that before long some attempt may be made in this country to include the principles of the decisions upon the subject in a single statutory enactment.

The Revised Reports. Edited by Sir F. Pollock, R. Campbell, and O. A. Saunders. Vol. VII. 1803–1804. (8, 9 & 10 Vesey—3, 4 & 5 East—1 & 2 Smith—3 Bos. & P.) London: Sweet & Maxwell, Lim. Boston: Little, Brown & Co. 1892. La. 8vo. xiv and 925 pp. (*25s.*)

The Editor cannot undertake the return or safe custody of MSS. sent to him without previous communication.
